Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Dwain Lee Kirkland
Pro se
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QUESTIONS PRESENTED

Sequenced to the 11th Circuit ruling:

II. May a federal court decide a fact or the existence of a fact on summary judgment.

IV. May a federal court circumvent the public policy of the forum state in a diversity action.

V. May a defendant file his motion to extend one day after the deadline to answer the complaint.

VI. Do the Federal Rules of Civil Procedure trump the substantive law of the forum state.

VII. Is recusal under 28 U.S.C.A. §§ 144 automatic and mandatory.

VIII. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to freely amend the complaint.

IX. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to call an expert witness.

X. Does a rule allowing for extensions of time to file a "brief" also apply to a statement of facts on summary judgment.

XI. Which party actually prevailed on the motions for summary judgment.

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JURISDICTION

28 USCS § 1254. Courts of appeals; certiorari; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, U.S. Constitution: "[N]or be deprived of life, liberty, or property, without due process of law..."

Amendment VII, U.S. Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV, U.S. Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Middle District Rules

7.2 **RESPONSE.** Respondent's counsel desiring to submit a response, brief, or affidavits shall serve the same within twenty (20) days after service of movant's motion and brief.

6.2 **EXTENSIONS FOR FILING OF BRIEFS.** In civil, cases, the clerk of the court and his deputies are authorized to permit extensions of time to a date certain not to exceed fourteen (14) days for the filing of briefs.

STATEMENT

A. COURT RULINGS BELOW

En Banc Rehearing denied 10/20/2009(App.infra.1a).
11th Circuit opinion 08/19/2009(App.Infra.39a).
Reconsideration denied 9/3/2008(App.Infra.56a).
Judgment 7/11/2008(App.Infra.66a).
Final Order7/11/2008(App.Infra.67a).
Reconsideration denied 6/5/2008(App.Infra.69a).
Middle District opinion 5/5/2008(App.Infra.80a).

B. FACTS OF THE CASE

Complaint text as filed 08/04/2006 Athens-Clarke county superior court. Sworn to by Kirkland pursuant to Official Code of Georgia Annotated 9-10-111:

IN THE SUPERIOR COURT OF CLARKE COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	
v.	)	
	)	
	)	**Civil Action**
The Guardian Life Insurance	)	**File No.** _____
Company of America	)	

and Others,)
Defendants.)

CERTIFIED COMPLAINT

That I, Dwain Lee Kirkland, do hereby depose and swear on my oath that all of the following is true and correct to the best of my personal knowledge and belief at this time:

That my name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

That I, Dwain Lee Kirkland, do hereby depose and swear on my oath that the following Complaint consisting of the first unnumbered paragraph regarding jurisdiction, the last unnumbered paragraph regarding relief, and all 43 counts, in essence the entire complaint, is true and correct to the best of my personal knowledge and belief at this time.

That The Guardian Life Insurance Company of America is a corporation, maintains its Home Offices at 7 Hanover Square, New York, N.Y. 10036, is allowed by the Secretary of State to do business in the State of Georgia, maintains a Registered Agent therein, and agents for doing the business of the company throughout the state. One such agent is Paul Demersseman, Agent #PA916, of Peachtree Planning Corporation, 649 S. Millege Avenue, Suite #7, Athens-Clarke County, Georgia 30605. Such as is stated above, The Defendant The Guardian Life Insurance Company of America is subject to the jurisdiction of this court.

That on or about April 4th, 1984 Plaintiff Dwain Lee Kirkland entered into a Disability Insurance Policy/Contract with The Guardian Life Insurance Company of America. That such Policy/Contract contains a Cost of Living Rider, Liberalization Rider with Waiver of Premium, and Florida Statutory Rider.

2.

That Plaintiff Dwain Lee Kirkland of Item #1 above shall hereinafter be referred to as the "the Plaintiff."

3.

That The Guardian Life Insurance Company of America of Item #1 above and/or Others as styled above shall hereinafter be referred to as "the Defendants."

4.

That the Disability Insurance Policy/Contract of Item #1 above shall hereinafter be referred to as the "the Contract."

5.

That on or about February 1st, 1993, while the Contract was in force, the Plaintiff became disabled under said contract.

6.

That the Plaintiff was unaware of such Disability as related in Item #5 above at that time.

7.

That the Plaintiff was under the care of a Family Physician at the time of the Disability as related in Item #5 above.

8.

That the symptoms of the Disability as related in Item

#5 above were relayed to the Physician as related in Item #7 above with no resolution of the source of such symptoms.

9.

That the Plaintiff remained under the care of various physicians and health care facilities throughout the course of his disability with no resolution of the source of the symptoms as related in Item #8 above.

10.

That the Plaintiff had a short period of Residual Disability as outlined under the Contract from about November 1999 to December 2000.

11.

That such period of Residual Disability as related in Item #10 above was covered under the Contract.

12.

That such symptoms as related in Item #8 above recurred on or about December 31st, 2000 placing the Plaintiff in a hospital emergency room for twelve hours.

13.

That such symptoms as related in Item #'s 8 and 12 above were still unresolved.

14.

That about 2001 Plaintiff became so sensitive to his food products and environmental surroundings that he stopped consuming meat of all types and food additives of any kind. That Plaintiff also at that time discontinued his use of soap, deodorant, shampoo and toothpaste due to this sensitivity.

15.

That about 2002 Plaintiff became extremely sensitive to sources of Electromagnetism.

16.

That the symptoms as related in Item #'s 14 and 15 above were a worsening of Plaintiff's Disability.

17.

That the Plaintiff's condition further worsened to the point that about February 2003 the Plaintiff filed a disability claim under the Contract. That the Plaintiff was still uncertain of the source of his symptoms.

18.

That over a period of months the Plaintiff had and did use various techniques sometimes known as Body Work in an attempt to find the source of his symptoms.

19.

That in the course of the investigation as related in Item #18 above, the Plaintiff discovered that he was suffering from a plethora of sensitivities, some appearing allergic in nature while others were related to physical injury. That some of these sensitivities and injuries appeared to first manifest themselves at the age of seven and haunted the Plaintiff throughout his life resulting as well in three unnecessary surgeries which further injured the Plaintiff.

20.

That on or about August 29th, 2003 all of the information as related in Item #19 above along with pertinent Healthcare Providers was dispatched to Berkshire Life Insurance Company of America at a Massachusetts address via a carrier known as Federal Express. That

this information constitutes "Proof of Loss" under the Contract. That the Plaintiff, based on his investigations, placed the date of such "Loss" to February 1st, 1993.

21.

That Berkshire Life Insurance Company of America as related in Item #20 above is a wholly-owned subsidiary of the Defendants and/or an agent in a Master/Slave relationship to the Defendants.

22.

That Berkshire Life Insurance Company of America shall hereinafter be referred to as Berkshire.

23.

That Berkshire services the Contract as related in Item #1 above at the direction of the Defendants.

24.

That the Defendants are wholly responsible for the activities of Berkshire as related in Item #23 above.

25.

That Berkshire did not act on the Plaintiff's "Proof of Loss" as related in Item #20 above for over two full years. That instead, Berkshire engaged in various tactics popularly known as "stonewalling." That due to Berkshire's inaction on the claim, some of the Plaintiff's Medical Records pertinent to the "Proof of Loss" of Item #20 above were forever lost. That such activities of Berkshire and the subsequent loss of the Plaintiff's Medical Records due to such activities constitutes a permanent breech of contract that can never be mended short of payment of the entire claim. That the Plaintiff made the President of Guardian Life Insurance Company of America, the Defendants, aware of such

activity via Certified Mail. That the activities of Berkshire were by law activities of the Defendant.

26.

That about December 2004 the Plaintiff made the Defendants aware that he was also suffering Post Traumatic Stress Disorder. That the Defendants at that time paid a portion of the Plaintiff's claim to about March 2003.

27.

That the Defendants still have not paid all the Cost of Living Rider amounts due under the Contract to March 2003.

28.

That the Defendants still have not paid all the Waiver of Premium amounts due under the Contract to March 2003.

29.

That the Defendants are in a permanent breech of the Contract as related in Item #1 above for the amounts due under the Contract from February 1st, 1993 to about February 28th, 2003.

30.

That the Plaintiff provided "Proof of Loss" within the period for which Guardian was liable, which satisfies "within 90 days after the end of the period for which Guardian is liable" as per Page 9 of the Contract.

31.

That the Plaintiff supplied the Defendants with a subsequent and secondary narrative "Proof of Loss."

32.

That the Plaintiff demanded payment on the Contract via Certified Mail from the President of Guardian Life Insurance Company of America, the Defendants, on both "Proofs of Loss."

33.

That the Defendants are in Breech of the Contract as related in Item #1 above.

34.

That the Defendants may have sent persons onto Private Property in Florida who did not properly identify themselves or their business.

35.

That the Defendants repeatedly engaged in interpretation of the Contract--a legal contract, in apparent violation of Georgia Law--in their letters to the Plaintiff.

36.

That the Defendants apparently had persons call his sister's place of business who misrepresented their identity and their business.

37.

That the Defendants engaged in Fraud when they accepted Premium Payments from the Plaintiff but had no intention of honoring certain portions of the Contract.

38.

That the Defendants misfeasance and malfeasance as related in Item #'s 34 to 37 above are Interstate in nature.

39.

That the Contract is a simple contract under the laws of the states of Florida and Georgia.

40.

That the Contract contains a Florida Statutory Rider.

41.

That the statute of limitations as related in Item #'s 39 and 40 above runs to on or about August 29th, 2008.

42.

That all conditions of the law and the Contract, for payment of the claim, have been met.

43.

That the Plaintiff's Disability is continuing in nature and now appears to be a combination of Post Traumatic Stress Disorder with onset at the age of five due to Child Abuse; and Chronic Fatigue Syndrome with attendant sensitivities with onset at the age of six. That the Chronic Fatigue Syndrome was apparently brought about and continues due to infection with a known or unknown virus such as Epstein Barr.

WHEREFORE, the Plaintiff Dwain Lee Kirkland demands judgment against The Guardian Life Insurance Company of America and/or the Defendants, for the amounts due under the Contract from February 1st, 1993 to February 28th, 2003, approximately $115, 560, plus Cost of Living Rider amounts for that period, plus Waiver of Premium amounts for that period, plus Cost of Living Rider amounts for the period from March 2003 to the present, plus Waiver of Premium amounts for the period from March 2003 to the present, plus a 25%

Penalty on all amounts due the Plaintiff per State Law, plus costs, plus a reasonable attorney's fee.

s/ Dwain Lee Kirkland

By Dwain Lee Kirkland

08/03/2006

Date

Mary Fitzpatrick

Notary Public

My Comm. Expires: 05-15-2008

Affix notary seal here:

MARY FITZPATRICK
NOTARY
PUBLIC
Exp. May 15, 2008
MADISON, COUNTY, GA
(Stamped)

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

8/4/2006

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

The insurance contract text(PAGE NINE):

Notice of claim
Notice of claim must be given Guardian *within 30 days* after any loss for which it is liable occurs or starts, *or as soon after that as is reasonably possible.* Notice given by or for the insured, with his full name, date of birth or policy number, and address, will be deemed notice to Guardian, if given to Guardian at its home office, 201 Park Avenue South, New York, New York 10003; or to an authorized Guardian agent.

Claim forms
When it gets notice of claim, Guardian will send *claim forms for filing proof of loss.* If Guardian does not send such forms to the insured within 15 days after his notice, he may submit a written statement, *within the time required below,* that proves the occurrence, the nature, and the extent of the loss for which claim is made.

Time for filing proof of loss
Written proof of loss must be given Guardian at its home office or any agency office:

. for loss from disability *within 90 days after the end of the period for which Guardian is liable;*
. and for any other loss within 90 days of the date of loss.

If proof is not given within such time, *claim will not be denied or reduced if:*

. *it was not reasonably possible to give proof within such time;* and
. proof is given to Guardian as soon as possible.

In no case will Guardian pay benefits *if the delay in furnishing proof of loss is more than a year,* unless the insured has lacked legal capacity.(emphasis added)

District court omitted all contract language concerning notice of claim and claim forms from its ruling (Page2:10App.Infra.81a), instead using language from the proof of loss paragraph.

The three paragraphs read together yield Plaintiff Kirkland being required to give notice of claim *within 30 days...or as soon after that as is reasonably possible*; required to submit proper *claim forms for filing proof of loss...within the time required below;* required to give proof of loss *within 90 days after the end of the period for which Guardian is liable*; and the *claim will not be denied or reduced if: it was not reasonably possible to give proof within such time*; Plaintiff Kirkland only losing benefits *if the delay in furnishing proof of loss is more than a year[.]*

Clearly, the year within which insured has to file proof of loss does not begin running until the notice of claim mentioned in the earlier paragraph is filed.

To enter summary judgment against Kirkland, the district court looked at all facts surrounding Plaintiff's ten year inability to file notice of claim (the fact that his various disabilities went undiagnosed), then decided whether it was *reasonably possible* to give insurer notice of claim.

District court decided it was *reasonably possible* for

Kirkland to diagnose his own illnesses and timely, by 04/01/1993, give notice of claim to Defendant (partialSumm.J.05/05/2008Page29:11App.Infra.107a):

> Although the Court sympathizes with Plaintiff's plight, under the facts and circumstances of this case, no jury could conclude that it was reasonable for Plaintiff to suffer from this reportedly debilitating condition and remain almost constantly unemployed for ten years before contacting his disability income carrier.

Further (partialSumm.J.05/05/2008Page29:n.13App.Infra.108a).:

> The Court also notes that it would have been difficult for Plaintiff to comply with the terms of the Policy or understand that the Policy definition of "totally disabled" since his testimony indicates that he failed to look at the Policy until 2003. (Pl.'s Dep. 109:17-20.).

After initial perusal of the policy, no reasonable person would again look at it until he realized he might be disabled and the policy might in fact cover him.

In all cited precedent by the trial and 11th Circuit courts, the insured had been diagnosed with some type of illness he did not deem disabling. The sole exception being a chiropractor failing to have his injured shoulder seen or treated at all.

Kirkland sought treatment on numerous occasions never being diagnosed with any of his disabling illnesses.

Moreover, Defendant Guardian removed the case to federal court in Georgia then failed to answer the complaint or file a motion for extension within five days, instead filing the motion to extend and the answer on the sixth day after removal.

Guardian also did not file a verified answer in

district court pursuant to OCGA 9-10-111, thereby avoiding having an officer of the corporation swear to the truthfulness of their answer. Plaintiff Kirkland moved to strike the answer. The Middle District judge ruled Georgia's substantive law (Official Code of Georgia Annotated 9-10-111) was merely procedural and was trumped by Fed.R.Civ.P.11.

The middle district judge ordered a scheduling order be entered into. Plaintiff Kirkland moved the court for time to find an attorney, being unaware of federal removal statutes and unfit to litigate in federal court. The judge denied Kirkland's motion, entering Defendant Guardian's version of the scheduling order. Plaintiff, obviously, had no input in it.

Plaintiff Kirkland's expert witness was struck pursuant to the scheduling order. Plaintiff's amended complaint, including RICO allegations, and motion were denied pursuant to the scheduling order.

Both parties filed Summ.J motions. Partial Summ.J was entered against Kirkland for failure to self-diagnose his physiological conditions of Multiple Chemical Hypersensitivity(MCH) and Electromagnetic Field Hypersensitivity(EFH) and his mental disorders of Post Traumatic Stress Disorder, Depressive Disorder(NOS) and Personality Disorder(NOS) by July 1993, though there are currently no diagnosis codes for MCH and EFH because the medical establishment does not believe them to be physical in nature, though researchers currently believe them to be physical in nature and possibly predisposed by genetics.

The judge also ruled Plaintiff was not entitled to residual disability benefits, an issue not properly before the court. The judge also ordered a supplement on the issue of paid premium reimbursement to Plaintiff.

Plaintiff Kirkland filed a motion for reconsideration alleging the district court had violated his 5th, 7th and 14th Amendment rights by deciding facts that were the sole

province of a jury. Motion denied.

District court's final order disposed of all Plaintiff Kirkland's claims though one of Defendant Guardian's premium reimbursement checks later bounced.

Final Judgment entered.

Plaintiff Kirkland filed a final order reconsideration motion asking that Defendant Guardian deposit the amounts in question in the court's registry for disbursement to Plaintiff. Motion denied.

Kirkland filed a notice of appeal.

The 11th Circuit(08/19/2009)affirmed all the trial court's rulings except one, ruling that the issue of residual disability benefits was not properly before the trial court.

Plaintiff Kirkland timely filed a Petition for Rehearing En Banc. Petition denied 10/20/2009.

Case before this court on petition for writ of certiorari to 11th Circuit.

C. THE EXCEPTIONAL IMPORTANCE OF RULINGS IN THIS CASE

The issue in Section II is of exceptional importance due to Kirkland arguing in the 11th Circuit and the trial court that he was deprived of 5th Amendment Due Process and the plain language of the 7th Amendment. The argument on this issue (Appellant'sBriefPages10-18) runs nine pages. Kirkland cited (P.10)*Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* for the proposition that only a jury may decide a fact, even the existence of a fact, arguing judges, due to outright corruption, simply ignore both argument and fact. Kirkland also argued (P.13) pursuant to *Adamson v. People of State of California, 332 U.S. 46 (1947)* et. al that the 7th Amendment should apply to the states via the Due Process clause of the 14th Amendment. Kirkland cited (P.17) *Gideon v. Wainwright, 372 U.S. 335 (1963)* for the proposition that the odds of getting a fair hearing from a judge on summary judgment are as remote

as the odds of Gideon getting a fair trial while representing himself. Kirkland cited (P.17-18) *Whitaker & Rambo Interior v. Prudential Property, 510 F.Supp. 97 (1981)* at page 98 for the proposition that Georgia's substantive law requires a trial by jury be had in a removal action unless Kirkland waived it in writing. He did not.

Yet the 11th Circuit holds "Kirkland did not argue before the district court that a jury trial was required under the Georgia Constitution" and "he does not make any substantive argument that the grant of summary judgment denied him due process." To the extent that court holds Kirkland, a pro se appellant, did not make a "substantive argument" on these issues in his brief, such holding is contrary to the holding of this Court in *Conley v. Gibson, 355 U. S. 41, 45-46 (1957)* and *Haines v. Kerner, 404 U. S. 519, 520, 521 (92 SC 594, 30 LE2d 652),* and *Watson v. Ault, 525 F.2d 886 (5th Cir.1976).* To require a pro se appellant with an 11th grade education to plead his case at the level of a professional appellate lawyer is "arbitrary and unreasonable...and unjust" thus violates 5th Amendment Due Process. See *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.*

A trial and appellate court holding, such as this, is precisely why the 7th Amendment should be strictly adhered to.

The Panel in reaching its conclusion in Section IV, violated the 10th Amendment, encroached on the sovereignty of the state of Georgia and deprived the Plaintiff of 5th or 14th Amendment Due Process contrary to this Court's holding in *Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145 (1932);* and the Georgia Supreme Court's holding in Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003) wherein that court complains (P.86-87) the 11th Circuit has "erroneously interpreted" its public policy at least twice.

The 11th Circuit holding in Section V conflicts with

this Court in *Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).* Guardian's counsel filed neither his motion to extend nor his answer till after the deadline for filing the answer. The 11th Circuit attempts to obfuscate this issue by claiming it was only the answer that was filed one day late.

The Panel's holding in Section VI, violates the 10th Amendment, encroaches on the sovereignty of the state of Georgia and deprives Kirkland of 14th Amendment Due Process contrary to this Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).*

The 11th Circuit's holding in Section VII deprives Kirkland of the plain language of 28 USC 144 and 5th Amendment Due Process of Law.

The panel's holding in Section VIII deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney, of 5th Amendment Due Process of law contrary to this Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue, then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding also conflicts with *Foman v. Davis, 371 U.S. 178 (1962).*

The Panel's holding in Section IX deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney, of 5th Amendment Due Process contrary to this Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue, then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding is also contrary to Congressional intent.

The Panel in Section XI has used Florida State judge-made law to deprive Kirkland of his constitutional right to Art. III, Sec. 2, Para.1: "between Citizens of different States"; and his 7th Amendment right to jury trial in a diversity action in federal court contrary to this

Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).* The 11th Circuit's holding is arbitrary and unreasonable, and thus deprives Kirkland of 5th Amendment Due Process, in that it required Kirkland to self-diagnose both his Post Traumatic Stress Disorder and its co-morbid conditions of Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) when no doctor could.

D. QUESTIONS

II. May a federal court decide a fact or the existence of a fact on summary judgment.

(AppellantsBriefError1Page4): *The middle district court's holding that Plaintiff's claim was untimely as a matter of law was error as well as being repugnant to the 5th, 7th and 14th Amendments.* (ReplyBriefPage6.)

Expansive argument was made (AppellantsBriefError1Pages10-18) regarding adhering to the plain language of the 7th Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Definition of Jury Nullification, Black's Law, 8th Edition:

> *jury nullification.* A Jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

The Founding Fathers were aware of jury nullification. They were also aware of judge nullification. James Madison was a lawyer. Based on the plain language of the 7th Amendment, The Founding Fathers obviously believed jury nullification to be a righteous deed, judge nullification to be an iniquitous evil. *Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* is an example of jury nullification. Twelve learned men of 1913 were not stupid enough to believe Slocum was technically covered under the life insurance contract. They simply believed it was arbitrary and unreasonable to expect Mrs. Slocum to get a legally binding signature on a "blue note" from a man who was so mentally and physically disabled he died within four days. Jury nullification. Reasonable, just, due process.

Exxon v. Alabama is an example of judge nullification costing the people, the state of Alabama 3.5 billion dollars. In *Exxon,* the company filed for declaratory judgment shortly after it was caught with "irregularities" in royalty payments. A jury twice awarded the state of Alabama punitive damages for fraud. Both verdicts were overturned on appeal, the first for an evidence violation. In the second, the Alabama Supreme Court overturned the punitive damage award on grounds that Exxon had not defrauded Alabama because it had been caught and had given the $50,000,000 "irregularities" back. How Absurd. The whole case turned on "scienter." Did Exxon know its reading of the lease was not reasonable, did it know its reading of the lease was a fraud. The jury decided it did, twice. The end of the enquiry? No. Judge nullification. An arbitrary and unreasonable confiscation of the property of the people and state of Alabama. *See* Sue Bell Cobb's dissent *Exxon v. State of Alabama,* 986 So.2d 1093, 1134 (2007).

In passing, I am descended from Richard Cobb "The Gallant Scot," may be a blood relative of Chief Justice Cobb's husband, her children.

Federal criminal defendants are entitled to jury nullification. Per the plain language of the 7th Amendment, Kirkland is entitled to jury trial in federal court where the jury may engage in *jury nullification*. On a reasonable reading of the 7th Amendment, only a Civil Grand Jury could decide a motion for summary judgment. A closer reading of the common law extant at the time of the adoption of the 7th Amendment yields that only a federal trial court judge may decide sufficiency of evidence and order a new trial. And that is only after the judge has heard the entirety of the oral testimony with his own ears. Summ.J. is a legal travesty I have never seen, state or federal, properly applied.

Kirkland (AppellantsReplyBriefPage7:14):

> "It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease." *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001).*
>
> *Lane,* under Florida law, is factually equivalent to this case and also conforms to Due Process. Anything else is "arbitrary and unreasonable" and repugnant to due process per AMERICAN LAND CO. v. ZEISS in Error #3 below.

The 11th Circuit simply ignored Kirkland's citation of *Lane*. For a judge to simply ignore an argument and citation in any court, fail to take up and refute it, is an omission that falls short of proper process and thus deprives a litigant of 5th Amendment Due Process of Law. Judge nullification is often accomplished by simply ignoring arguments and citations that cannot be refuted without drawing attention to the case. An experienced Georgia appellate lawyer remarked, "so erroneous as to arouse suspicion."

Kirkland (Appellant'sReplyBriefPage8:15):

> I intended a further discussion of summary judgment being repugnant to the 5th, 7th and 14th Amendments, requiring 1,570 words. I was confined to 7,000 words. This ground was also covered extensively in a motion for reconsideration (Doc.57).

Thus the 11th Circuit's holding that I did not make a proper Due Process argument. Bazaar.

In closing:

> The first maxim of a man who loves liberty, should be never to grant to rulers an atom of power that is not most clearly and indispensably necessary for the safety and well being of society.

Richard Henry Lee, great-uncle of Robert E. Lee and signer of The Declaration of Independence.

IV. May a federal court circumvent the public policy of the forum state in a diversity action.

(Appellant'sBriefError3Page20): *The middle district court's holding that the doctrine of lex loci contractus is applicable to this case is error.* (ReplyBriefPage10.)

Can substantive law in any state be used in Fed.R.Civ.P.56SummJ. to decide sufficiency of evidence? Rule 56 is procedural in federal court and must comply with the 5th & 7th Amendments. Judge-made state law does not, at present, have to comply with the 7th Amendment. Compliance with the 5th Amendment on Rule 56 would evoke precedent in the 11th Circuit, this Court and other circuits.

Kirkland (ReplyBrief Pages17-18):

"There is considerable authority from other jurisdictions that a cause of action does not accrue under such circumstances until the plaintiff discovers or with reasonable diligence should have discovered not only the injury but the cause of the injury. See R. J. Reynolds Tobacco Co. v. Hudson, 314 F2d 776 (5th Cir. 1963); Miller v. Beach Aircraft Corp., 204 Kan. 184 (460 P2d 535) (1969); Wiggington v. Reichold Chemicals, Inc., 133 Ill. App. 2d 776 (274 NE2d 118) (1971); Breaux v. Aetna Cas. &c. Co., 272 FSupp. 668 (E. D. La. 1967); Goodman v. Mead Johnson & Co., 388 FSupp. 1070 (D. N.J. 1974); Thrift v. Tenneco Chemicals, Inc., 381 FSupp. 543 (S. D. Tex. 1974); Gilbert v. Jones, 523 SW2d 211 (Tenn. Ct. App. 1974); G. D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22 (122 Cal. Rptr. 218) (1975); Allen, Roman v. A. H. Robins Co., Inc., 518 F2d 970 (5th Cir. 1975) (Tex.); Raymond v. Ely Lilly Co., 117 N.H. 164 (317 A2d 170) (1977); Harig v. Johns-Manville Products, 284 Md. 70 (394 A2d 299) (1978); Insurance Co. of North America v. Forty-Eight Insulations, Inc., 451 FSupp. 1230 (E.D. Mich. 1978); Schiele v. Hobart Corp., 284 Or. 483 (587 P2d 1010) (1978)." *KING v. SEITZINGERS, INC. et al., 62653 (160 Ga. App. 318) (287 SE2d 252) (1981).*

The 11th Circuit must adhere to precedent from The 5th Circuit.

Can judge-made law in Florida or Georgia trump 5th Circuit precedent regarding the discovery rule. Can judge-made law in either state force Kirkland to use his broken brain to self-diagnose his broken brain, force him to self-diagnose PTSD and its co-morbid conditions of Electromagnetic Field Hypersensitivity (EFH) and Multiple Chemical Hypersensitivity (MCH) in order to report them to an insurance company?

See Kirkland's affidavit (supportingEnBancApp.Infra.30a) concerning when he was

diagnosed with a disabling condition of any kind.

11th Circuit cites *Reliance,* 1940, and *N. Am. Ins. Co.,* 1909. Is anyone watching this? Both cases are so out of date they have absolutely no bearing on current law. But *Reliance* contains the discovery rule:

> It seems to be settled law in Florida that a default in serving notice or proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or unreasonable and the insured has not failed to use due diligence.

Reliance Life Ins. Co. of Pittsburgh, Pa. v. Lynch. (197 So. 723, 724) (1940).

Kirkland could not report his disability to the insurance company until he was diagnosed. Guardian has never argued Kirkland did not exercise "due diligence."

Again, 11th Circuit has deprived Kirkland of 5th Amendment Due Process by totally ignoring his argument. 11th Circuit does not mention Kirkland argued (ReplyBriefPages10-21), citing a dozen authorities, that Florida's judge-made law [see *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1287 (S.D.Fla.2001)]* presumes prejudice and thus is contrary to Georgia's public policy.

District court (PartialSumm.J.5/5/2008Page30:1App.Infra.108a):

> The fact that Plaintiff failed to timely file his notice of claim and proof of loss does not necessarily end the Court's inquiry. Rather, under Florida law, failure to comply with these provisions merely creates a presumption that the insurer was prejudiced.

Georgia's judge-made law applies the discovery rule:

The time limitations in policies of insurance requiring a report of incident 'as soon as practicable' are subject to a factual determination. 'The questions of the sufficiency of the excuse offered, and the diligence of the beneficiary in giving the notice after the removal of the disability, are generally questions of fact, to be determined by the jury, according to the nature and circumstances of each individual case.' North American Accident Ins. Co. v. Watson, 6 Ga. App. 193, 196 (64 SE 693); Pilgrim Health &c. Ins. Co. v. Chism, 49 Ga. App. 121 (3) (174 SE 212); Hulme v. Mutual Benefit &c. Assn., 60 Ga. App. 65 (2 SE2d 750).

When the testimony of record indicates that the first time any substantial evidence of a claim came to the attention of the principal insured he notified the agent as indicated in Division 1 of this opinion, **about 19 months after occurrence of the incident giving rise to the claim, it was not error to submit the issue of reasonableness of excuse to the jury, and the jury finding was supported by the evidence.**

NORFOLK & DEDHAM MUTUAL FIRE INSURANCE COMPANY v. CUMBAA., 47646. 128 Ga. App. 196, 198-199 (2) (196 SE2d 167) (1973).

Kirkland again asked the 11th Circuit (ReplyBriefPage20:4) to certify a question to Georgia's Supreme Court. Instead, 11th Circuit actually cites *Convergys Corp. v. Keener* (582 S.E.2d 84, 86) (Ga. 2003) wherein Georgia's Supreme Court complains of previous "public policy" decisions made in its behalf. *Convergys:*

> Since the injured party in this case is a Georgia resident, compare Cunningham v. Equitable Life Assur. Society of the United States, 652 F2d 306 (1) (2d Cir. 1981), we likewise reject Federal's argument that we should afford

comity to Florida's public policy in deterring aggravated conduct in that state by disallowing insurance coverage for punitive damages. Florida's public policy is not paramount. This case involves a Georgia corporation's liability to a Georgia resident, so the public policy of Georgia is superior to that of Florida. See General Motors Corp. v. Nat. Auto Radiator Mfg. Co., 694 F2d 1050 (6th Cir. 1982); Andrews, supra. Georgia's public policy concerns are the protection of both the injured party and the insured. See GEICO, supra. This case, as others, turns on its own particulars.

FEDERAL INSURANCE CO. v. NATIONAL DISTRIBUTING CO., INC.; and vice versa, A91A1709, A91A1710 (203 Ga. App. 763) (2) (417 SE2d 671) (1992).

Pursuant to *Federal,* Georgia holds Defendant Guardian a resident Corporation:

> Additionally, in Allstate Ins. Co. v. Klein, 262 Ga. 599 (422 SE2d 863) (1992), the Supreme Court of Georgia examined the definition of nonresident in the Georgia Long Arm Statute (OCGA 9-10-90) and held that "a corporation which is 'authorized to do or transact business in this state at the time a claim' arises is a 'resident' for purposes of personal jurisdiction over that corporation in an action filed in the courts of this state. As a resident, such a foreign corporation may sue or be sued to the same extent as a domestic corporation." Id. at 601, n. 2 and accompanying text.

Harry S. Peterson Co., Inc. v. National Union Fire Insurance Co., A93A0564. (209 Ga. App. 585) (434 SE2d 778) (1993) cited by *Federal.*

Federal is the closest Georgia has come to the circumstances of this case, though not precise enough. I twice asked the 11th Circuit to certify this question to

Georgia's Supreme Court.

11th Circuit deprived Kirkland of his 10th Amendment right to live in Georgia under its constitution, its laws, free of federal interference; and as well encroached on Georgia state sovereignty. 11th Circuit conflicts with this Court in *Bradford Electric Light Co., Inc. v. Clapper,* 286 U.S. 145 (1932); and Georgia's Supreme Court in *Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003).*

V. May a defendant file his motion to extend one day after the deadline to answer the complaint.

(Appellant'sBriefError4Page22): *The trial court's holding that allowed Defendants to file their response to the complaint after the deadline, due to inadvertence, was error.* (ReplyBriefPage21.)

11th Circuit cites *Pioneer* for holding a defendant may file his motion to extend the time to answer one day after the deadline to file the complaint. *Pioneer* itself cites *Re South Atlantic* and *Klapprott v. United States:*

> Thus, in In re Underground Utility Construction Co., 35 B.R. 588 (Bankr.S.D.Fla.1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimely filing was the result of his failure to mail his claim to the proper address. *In Re South Atlantic Financial Corp., 767 F.2d 814, 817 (1985).*

11th Circuit's holding is contrary even to *In Re South Atlantic.* Moreover, comparing a late filing in a bankruptcy case to late filing an answer to a complaint is apples to oranges. Answering a complaint is governed by Fed.R.Civ.P. In *Klapport,* this Court held in order to show excusable neglect under Fed.R.Civ.P.60(b), Klapport had to

be destitute, and in jail:

> For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings.

Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).

Defendant's counsel was neither destitute nor in jail at the time he inadvertently, incorrectly marked his desk calendar. 11th Circuit holding conflicts with this Court. This Court has NEVER, to my knowledge, ruled a defendant may file his motion to extend after the deadline for the answer. If they had, 11th Circuit would have cited it.

VI. Do the Federal Rules of Civil Procedure trump the substantive law of the forum state.

(Appellant'sBriefError5Page23): *The trial court's holding that allowed Defendants to file an unverified response to Plaintiff's complaint was error.* (ReplyBriefPage22.)

11th Circuit cites *Esfeld* holding Guardian did not have to adhere to Georgia's substantive law, OCGA 9-10-111. *Esfeld* (Page1306) cites *Gasperini:*

> Informed by these decisions, we address the question whether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court"?

Id., at 468, n. 9.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).

Failure to apply Georgia's Substantive law, OCGA 9-10-111, in federal court discriminates "against citizens [Kirkland] of the forum state," and made Guardian "choose the federal court" because OCGA 9-10-111 required an officer of Guardian to swear no "interstate fraud," Mail/Wire fraud, was committed.

VII. Is recusal under 28 U.S.C.A. §§ 144 automatic and mandatory.

(Appellant'sBriefError6Page23): *6. Trial court Judge Clay Land's refusal to be recuse himself under either section of the federal code was error.* (ReplyBriefPage22.)

11th Circuit (Page9:1App.Infra.45a): "a district judge's decision on whether to recuse himself." 11th Circuit is ruling as if Kirkland filed under 28 USC 455 but admits Kirkland actually filed under 28 USC 144. 11th Circuit cites *Hamm:*

> Two statutes govern the recusal of a federal district judge. 28 U.S.C.A. §§ 144, 455. . Section 144 provides for recusal when a party files a timely and technically correct affidavit and motion alleging the judge before whom the matter is pending is personally biased or prejudiced against him or in favor of an adverse party. Section 455 sets forth a general rule that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned, 28 U.S.C.A. § 455(a), and also several specific situations in which a judge must do so. 28 U.S.C.A. § 455(b).
>
> The plaintiff in this case invoked neither statute in the district court....

Hamm v. Members of BD. of Regents of State of Fla., 708 F.2d 647, 651 (1983).

11th Circuit admits Kirkland invoked 28 USC 144 in district court. Bias does not have to be proven. Recusal is "mandatory" and "automatic" if affidavit is "technically correct." See *U.S. v. Sykes*, C.A.7(Wis.)1993, 7 F.3d 1331; also *Brotherhood of Locomotive Fireman and Engineman v. Bangor & A.R. Co.*, C.A.D.C.1967, 380 F.2d 587.

11th Circuit deprived Kirkland of the plain language of 28 USC 144 and 5th Amendment Due Process.

VIII. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to freely amend the complaint.

(Appellant'sBriefError7Page24): *The trial court's holding that Plaintiff could not amend his complaint to include RICO damages was error.* (ReplyBriefPage22.)

Kirkland (ReplyBriefPage22:17):

> Kirkland's Motion (Doc.26). His Reply (Doc.41,P.2-8) cites seven authorities, most particularly the Middle Districts own case *Cowart v. Metropolitan Life Ins. Co., 444 F. Supp. 2d 1282, 1295 (M.D. Ga. 2006)* granting plaintiff's motion to amend where defendant was "on notice" of a potential claim since the inception of the lawsuit.)."

11th Circuit cites *Smith*. This case is distinguishable from *Smith* for the following reasons: Smith agreed to the scheduling order, Kirkland had it forced on him while he moved the district court for time to find an attorney. Smith was not looking for an attorney. Smith did not file in state court in ignorance of a federal removal statute. Smith had been working and was not 100% disabled both mentally and physically. In *Smith*, the court did not rule on his

motion but reserved it and summary judgment on the main claim made the motion moot. Kirkland filed both the motion and the amended complaint at the same time.

Page 1366 *Smith v. School Bd. Of Orange County* (487 F.3d 1361) (11th Cir. 2007) cites *Sosa:*

> The record makes clear that Sosa's failure to comply with the court's scheduling order resulted from a lack of diligence in pursuing her claim.

Sosa v. Airprint Systems, Inc. (133 F.3d 1417, 1419) (11th Cir. 1998).

Sosa was represented by counsel. Kirkland showed no "lack of diligence," just complete inability due to disability and not being a lawyer.

Notes of the Advisory Committee 1983 amendments Fed.R.Civ.P.16:

> Para.2: "In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome."
> Para.3: "Second, the result frequently is nothing but a formal agreement on minutiae."
> Para.4: "When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. ...But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case."
> Para.5: "However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated."
> Subdivision (e), Pretrial Orders, para3: "Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, e.g., Clark v. Pennsylvania R.R. Co., 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard

> **for amending the pretrial order probably are less important than the meaning given them in practice.** By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next."

To issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically, Plaintiff, a scheduling order, not even "**mandated**" by congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to this Court's holding in *American Land Co. v. Zeiss,* 219 U.S. 47 (1911) at P.96. Putting unnecessary restrictions on amending a complaint also conflicts with *Foman v. Davis,* 371 U.S. 178 (1962).

If both this error and Summ.J. are reversed, Kirkland can then pursue the entirety of his claim.

IX. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to call an expert witness.

(Appellant'sBriefError8Page26): *The trial court's holding that Plaintiff's expert witness would be struck for failure to timely comply with Rule 26 notices while Defendants' expert witnesses would not be struck for the same infraction was error.* (ReplyBriefPage23.)

11th Circuit argues it is my *pro se* status preventing me from "litigating" this case. IT IS MY DISABILITY. I also missed the deadline for filing Record Excerpts in 11th Circuit. *See* FORTY-ONE count affidavit in Motion to Reinstate for how my multiple disabilities affect my ability to function.

Here again, to issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically, Plaintiff, a scheduling order, not even "**mandated**" by

congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to this Court's holding in *American Land Co. v. Zeiss,* 219 U.S. 47 (1911) at P.96. This holding is also contrary to Congressional intent.

If both this error and Summ.J. are reversed, Kirkland can then pursue the entirety of his claim.

X. Does a rule allowing for extensions of time to file a "brief" also apply to a statement of facts on summary judgment.

(Appellant'sBriefError9Page26): *The trial court's holding that Defendants' untimely factual response to Plaintiff's motion for summary judgment was in fact timely was error.* (ReplyBriefPage23.)

District Court (PartialSumm.J.5/5/2008Page11:9App.Infra.90a):

> The briefing schedule was necessarily altered by the fact that Plaintiff filed his brief on August 13th. ...Because of this alteration, Guardian's brief was due on September 5, 2007, twenty-three days after service of Plaintiff's brief. However, the briefing schedule was again altered on August 31, 2007, when Guardian requested an extension to file its response. This extension was also permissible. ...Local Rule 6.2 permits the clerk of court and his deputies "to permit extensions of time to a date certain not to exceed fourteen (14) days for the filing of briefs." Because the deputy clerk granted Guardian's request for an extension, Guardian's response to Plaintiff's motion for summary judgment was due on September 14, 2007. Guardian filed its response and statement of disputed material facts on that day.

What district court accomplished with this ¾ page jig was

allowing Defendant Guardian to file a "response" under Local Rule 6.2 that, by its plain language, only applies to "the filing of briefs." Guardian's "response," its statement of facts, was due on "September 5th, 2007" pursuant to Local Rule 7.2. The clerk had no authority under Local Rule 6.2 to give Guardian another 14 day extension for anything except their "briefs." Both Local Rules 7.2 & 6.2 are reproduced in Constitutional and Statutory Provisions Involved (Page2) above.

XI. Which party actually prevailed on the motions for summary judgment.

11th Circuit combined errors 10 and 11 from Appellant's Briefs:

(Appellant'sBriefError10Page27): *The trial court's granting of partial summary judgment in favor of Defendants was error.*(ReplyBriefPage23.)

Notice of Claim: 11th Circuit cited *Nat'l Gypsum,* a 1982 surety bond case, Florida's Supreme Court, and completely distinguishable from this case.

More on point is *American,* The Florida Second District Court of Appeal:

> '[A]s soon as practicable' has been construed to mean that notice is to be given with reasonable dispatch and within a reasonable time *in view of all the facts and circumstances of the particular case.* ...[It] being frequently stated that prejudice is presumed under these circumstances. *This does not mean upon a showing of delay, alone, the insurer walks out of court free of potential claims.* (Emphasis added.)

American Fire and Casualty Co. v. Collura (163 So.2d 784, 792) (1964).

Precisely on target is *Lane* originally cited by

Guardian without careful reading:

> It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease.

Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001).

The United States District Court for the Southern District of Florida encompasses Miami-Dade County where the contract was delivered in 1984.

Under Florida law it was not "reasonably possible" for Kirkland to give notice to Guardian until his symptoms were "diagnosed" as Post Traumatic Stress Disorder or its co-morbid conditions Electromagnetic Field Hypersensitivity (EFH), Multiple Chemical Hypersensitivity (MCH). Kirkland's disability began in 1993; he immediately informed Guardian in 2004 when first diagnosed with any disabling condition. *See* Kirkland's affidavit supporting Petition for En Banc Rehearing(App.Infra.30a).

11th Circuit engages a bit of prevarication:

> Kirkland knew that he was suffering from a number of physical symptoms.

None of those symptoms however, while seeing numerous doctors, a hospital emergency room for twelve hours, and otherwise exercising due diligence, was ever diagnosed.

I have encountered much adversity in my life. I have been beaten in the street by members of Georgia law enforcement handcuffed. But perhaps the worst beating of all is the beating I have taken in Georgia's courts.

(Appellant'sBriefError11Page28): *The trial court's denial of summary judgment in favor of Plaintiff was*

error.(ReplyBriefPage24.)

11th Circuit
(11thCircuitRulingPage12:21App.Infra.48a):

> However, he does not discuss the fraud or RICO claims on appeal, but, instead, only refers to documents filed in the district court.

Kirkland specifically raised the argument concerning RICO at error #10 (Appellant'sInitialBriefPages27-28) asking the 11th Circuit to review his motion for summary judgment, specifically the affidavit. The Panel cites *Four Seasons* which in turn cites *APA Excelsior III L.P.:* [W]e do not consider claims not raised in a party's initial brief and made for the first time at oral argument." *APA Excelsior III L.P. v. Premiere Technologies (476 F.3d 1261, 1269) (11th Cir. 2007).*

Kirkland raised the argument in his "initial brief."

Kirkland further argued "Negligence, Breech of Contract & Fraud/RICO"(ReplyBriefError11Pages24-27) citing five forum state authorities and two sections of the Georgia code.

So much for not raising "fraud or RICO claims on appeal."

It's very simple. If an insurance company intentionally refuses to request medical records for three years(August2003-May2006), it is guilty of "scienter" and fraud for the value of the claim. If it fails through negligence to request medical records for three years then denies your claim for lack of evidence, it is guilty of negligence for the value of the claim. Both of these claims are allowable under Georgia law.

Further
(PartialSumm.J.5/5/2008Page6n.4App.Infra.85a):

> [4]Guardian admits that the payment was, in fact,

incorrect and should have been in the amount of $9,720.00 instead of $1,630.00. The company inadvertently omitted a $900 per month social insurance substitute and paid Plaintiff only his $180 per month disability benefit. (See Ex.14toDef.'sMot.forSumm.J.4.)

A reasonable jury could find this to be a fraud in the amount of $8,090.00. Kirkland caught Guardian like Alabama caught Exxon.

Further (PartialSumm.J.5/5/2008Page31:25App.Infra.109a):

With respect to Plaintiff's claim for additional cost-of-living adjustments, Guardian contends that after reviewing Plaintiff's claim, "Berkshire determined that additional cost-of-living benefits of $917.04 were owed and the additional benefits were paid to plaintiff on July 18, 2007."(FanielAff.IPara.23.)

"[W]ere paid...2007" after Kirkland sued them. *See* complaint (Page2) above.

Further (PartialSumm.J.5/5/2008Page32:20App.Infra.110a):

With respect to Plaintiff's refund and waiver of premium claims, however, the present record contains insufficient evidence to allow the Court to resolve the matter on summary judgment. Plaintiff avers that there was never a premium waiver and that he has "constantly paid the premiums."(Pl.'sDep.210:17-23;Pl.'sAff.IIPara.24.) Lance Faniel, Berkshire's Claims Manager, avers that "[w]hen Berkshire determined that [Plaintiff] was entitled to disability benefits, the company refunded the premiums that he had paid since his date of disability in 2003. [Plaintiff's] premiums have been waived since then, and no additional premiums have been received by

Berkshire."(FanielAff.IPara.24.)

No premium waiver till Kirkland sued them. *See* complaint (Page2) above.

Kirkland quoted *Cesnik v. Edgewood Baptist Church,* 88 F.3d 1902 (11thCir.) extensively (Appellant'sBriefError11Page28:16).

Kirkland (ReplyBriefError10Page23:19):

Guardian's motion (Doc.27) submitted no admissible evidence that Kirkland was not disabled as of 1993. Kirkland submitted admissible evidence (Doc.31,Para.1,(a)to(e))that he was. Georgia courts allow an insured to swear to his own disability. See *Franklin Life Insurance [v. Ransom 33766 (85 Ga. App. 659) (1) (69 SE2d 905) (1952)]*

District court (PartialSumm.J.5/5/2008Page9n.6App.Infra.88a):

> For purposes of the pending motions, Guardian does not appear to contend that Plaintiff was not disabled; rather, it bases its motion for summary judgment on the fact that Plaintiff failed to comply with the foregoing conditions.

Guardian failed to factually rebut Kirkland's motion on this issue. Kirkland prevails.

E. OTHER RELIEF

Plaintiff/Petitioner prays for other and further relief as may be due and granted under the rules of this Court and the laws of the United States.

REASONS FOR GRANTING THE PETITION

Justice.

CONCLUSION

Mr. Justice Story:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . .

Parsons v. Bedford, 3 Pet. 433, 446, 7 L. ed. 732, (1830).

Respectfully submitted,

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January 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 20 2009
THOMAS K. KAHN
CLERK
(Stamped)

No. 08-15699-AA

DWAIN LEE KIRKLAND,

Plaintiff-Appellant,

versus

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BIRCH, BLACK and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Susan H. Black

ORD-42

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
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(Stamped)

No. 08-15699-A

DWAIN LEE KIRKLAND,

PLAINTIFF-APPELLANT

v.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
AND OTHERS,

DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

PLAINTIFF/APPELLANT'S PETITION FOR EN BANC REHEARING

Respectfully submitted by:

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Pro se

U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Dwaine Lee Kirkland *vs.* The Guardian, Appeal No. 08-15699-A

11th Cir. R. 26.1 (see reverse) requires that a Certificate of interested Persons and Corporate Disclosure Statement must be filed by the appellant with this court within 10 days after the date the appeal is docketed in this court, and must be included within the principal brief filed by any party, and included within any petition, answer, motion or response filed by any party. **You may use this form to fulfill this requirement.** In alphabetical order, with one name per line, please list the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

(please type or print legibly):

1. The Berkshire Life Insurance Company of America, a mutual company, Massachusetts, Defendant's subsidiary

2. Carter & Ansley, LLP, Atlanta, Georgia, Defendant's Law Firm

3. H. Sanders Carter, Jr., Esq., Defendant's Counsel

4. Andrea K. Cataland, Esq., Defendant's Counsel

5. The Guardian Life Insurance Company of America, a mutual company, New York, defendant

6. Michael Patrick Johnson, Esq., Defendant's Counsel

7. Dwain Lee Kirkland, Plaintiff

8. Clay D. Land, Judge, Middle District of Georgia

9. Lisa Renee Richardson, Esq., Defendant's Counsel

10. Smith, Moore, Leatherwood, LLP, Atlanta, Georgia, Defendant's Law Firm

District Court Number: 06-00107 CV-CDL-3

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U.S.C.A. DOCKET NO. 08-15699-AA
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DW AIN LEE KIRKLAND
Plaintiff-Appellant

v.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

Defendant-Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

So that the judges of this Court may evaluate possible disqualification or recusal, The Guardian Life Insurance Company of America certifies that the following parties have an interest in the outcome of the case:

Carter & Ansley LLP, which merged into Smith Moore Leatherwood LLP (attorneys for The Guardian);

Carter, Jr., H. Sanders (attorney for The Guardian);

Cataland, Andrea K. (attorney for The Guardian);

The Guardian Life Insurance Company of America, a mutual insurance company (defendant-appellee);

(C1)

Johnson, Michael P. (attorney for The Guardian);

Kirkland, Dwain Lee (pro se plaintiff-appellant);

Land, Clay D. (district court judge);

Richardson, Lisa R. (former attorney for The

Guardian); and Smith Moore Leatherwood LLP (attorneys for The Guardian).

The following are subsidiaries of The Guardian:

Berkshire Life Insurance Company of America
First Commonwealth, Inc.
Guardian Baillie Gifford Limited
Guardian Investor Services LLC
Guardian Trust Company, FSB
Innovative Underwriters, Inc.
Managed Dental Care (California)
Managed DentalGuard, Inc. (New Jersey)
Managed DentalGuard, Inc. (Texas)
Park Avenue Life Insurance Company
Park Avenue Securities LLC
RS Investment Management Co. LLC
The Guardian Insurance & Annuity Company, Inc.

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III.

APPELLANT'S PETITION FOR EN BANC REHEARING

This judgment was filed August 19th, 2009 making this Petition due on Wednesday September 9th, 2009. It is being filed on or before September 9th, 2009.

STATEMENT OF THE EXCEPTIONAL IMPORTANCE OF RULINGS IN THIS CASE

The issue in Section II is of exceptional importance due to Kirkland arguing both in this Court and in the trial court that he was deprived of 5th Amendment Due Process and the plain language of the 7th Amendment. The argument on this issue in Appellant's brief runs from P.10-18, nine pages. Kirkland cited *Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* at page 10 for the proposition that only a jury may decide a fact, even the existence of a fact, arguing that judges, due to outright corruption, simply ignore both argument and fact. Kirkland also argued at P.13 that pursuant to cases such as *Adamson v. People of State of California, 332 U.S. 46 (1947),* the 7th Amendment should be applied to the states via the Due Process clause of the 14th Amendment. At P.17 Kirkland cited *Gideon v. Wainwright, 372 U.S. 335 (1963)* for the proposition that the odds of getting a fair hearing from a judge on summary judgment are as remote as the odds of Gideon getting a fair trial while representing himself. At P.17-18 Kirkland cited *Whitaker & Rambo Interior v. Prudential Property, 510 F.Supp. 97 (1981)* at page 98 for the proposition that Georgia's substantive law requires that a trial by jury be had in a removal action unless Kirkland waived it in writing. And he did not.

Yet the Panel holds "Kirkland did not argue before the district court that a jury trial was required under the Georgia Constitution" and "he does not make any substantive argument that the grant of summary judgment denied him due process." To the extent that this Court holds that Kirkland, a pro se appellant, did not make a

"substantive argument" on these issues in his brief, such holding is contrary to the holding of the Supreme Court in *Conley v. Gibson, 355 U. S. 41, 45-46 (1957)* and *Haines v. Kerner, 404 U. S. 519, 520, 521 (92 SC 594, 30 LE2d 652),* and *Watson v. Ault, 525 F.2d 886 (5th Cir.1976).* To require a pro se appellant with an 11th grade education to plead his case at the level of a professional appellate lawyer is "arbitrary and unreasonable...and unjust" and violates 5th Amendment Due Process. See *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.*

A Panel holding, such as this, is precisely why the 7th Amendment should be strictly adhered to.

The Panel in reaching its conclusion in Section IV, violated the 10th Amendment, encroached on the sovereignty of the state of Georgia and deprived the Plaintiff of 5th or 14th Amendment Due Process contrary to the U.S. Supreme Court's holding in *Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145 (1932);* and the Georgia Supreme Court's holding in Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003) wherein that court complains at P.86-87 that this Court has "erroneously interpreted" its public policy at least twice.

The Panel's holding in Section V conflicts with the Supreme Court in *Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).* Guardian's counsel filed neither his motion to extend nor his answer till after the deadline for filing the answer. It appears that the Panel is trying to obfuscate this issue by claiming that it was only the answer that was filed one day late.

The Panel's holding in Section VI, violates the 10th Amendment, encroaches on the sovereignty of the state of Georgia and deprives Kirkland of 14th Amendment Due Process contrary to the Supreme Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).*

The Panel's holding in Section VII deprives Kirkland of the plain language of 28 USC 144; and, 5th Amendment Due Process of Law.

The panel's holding in Section VIII deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney for his case, of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue and then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding also conflicts with *Foman v. Davis, 371 U.S. 178 (1962).*

The Panel's holding in Section IX deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney for his case, of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue and then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding is also contrary to Congressional intent.

The Panel in Section XII has used Florida State judge-made law to deprive Kirkland of his constitutional right to Art. III, Sec. 2, Para.1: "between Citizens of different States"; and his 7th Amendment right to trial by jury in a diversity action in federal court contrary to the Supreme Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).* The panel's holding is arbitrary and unreasonable, and thus deprives Kirkland of 5th Amendment Due Process, in that it required Kirkland to self-diagnose both his Post Traumatic Stress Disorder and its co-morbid conditions of Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) when no doctor could.

SECTION II.

I made an expansive argument at P.10-P.18 of Appellant's brief regarding adhering to the plain language of the 7th Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Definition of Jury Nullification, Black's Law, 8th Edition:

> *jury nullification.* A Jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

The Founding Fathers were aware of jury nullification. They were also aware of judge nullification. James Madison was a lawyer. Based on the plain language of the 7th Amendment, The Founding Fathers obviously believed jury nullification to be a righteous deed and judge nullification to be an iniquitous evil. *Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* is an example of jury nullification. Twelve learned men of 1913 were not stupid enough to believe that Slocum was technically covered under the life insurance contract. They simply believed that it was arbitrary and unreasonable to expect Mrs. Slocum to get a legally binding signature on a "blue note" from a man who was so mentally and physically disabled that he died within four days. Jury nullification. Reasonable, just, due process.

Exxon v. Alabama is an example of judge

nullification that cost the people of the state of Alabama 3.5 billion dollars. In *Exxon,* the company filed for declaratory judgment shortly after it was caught with "irregularities" in royalty payments. A jury twice awarded the state of Alabama punitive damages for fraud. Both verdicts were overturned on appeal, the first for an evidence violation. In the second appeal, the Alabama Supreme Court overturned the punitive damage award on the grounds that Exxon had not defrauded Alabama because it had been caught and had to give the $50,000,000 in "irregularities" back. How Absurd. The whole case turned on "scienter." Did Exxon know that its reading of the lease was not reasonable, did it know its reading of the lease was a fraud. The jury decided that it did. Should have been the end of the enquiry. Judge nullification. An arbitrary and unreasonable confiscation of the property of the state of Alabama. See Sue Bell Cobb's dissent *Exxon v. State of Alabama, 986 So.2d 1093, 1134 (2007).*

In passing, I am descended from Richard Cobb "The Gallant Scot" and may be a blood relative of Chief Justice Cobb's husband and children.

Federal criminal defendants are entitled to jury nullification. Per the plain language of the 7th Amendment, Kirkland is entitled to a jury trial in federal court where the jury may in fact engage in *jury nullification.* Per the 7th Amendment, only a Civil Grand Jury could decide a motion for summary judgment in a federal court.

Kirkland at P.7 of Appellant's Reply Brief:

> "It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease." *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001).*

Lane, under Florida law, is factually equivalent to

this case and also conforms to Due Process. Anything else is "arbitrary and unreasonable" and repugnant to due process per AMERICAN LAND CO. v. ZEISS in Error #3 below.

The Panel simply ignored Kirkland's citation of *Lane*. For a judge to simply ignore an argument and citation in any court, fail to take up and refute it, is NOT a proper process and thus deprives a litigant of 5th Amendment Due Process. Jude nullification is often accomplished by simply ignoring arguments and citations that cannot be refuted without drawing attention to a case. As one experienced Georgia appellate lawyer remarked, "so erroneous as to arouse suspicion."

Kirkland at P.8 of Appellant's Reply Brief:

I intended a further discussion of summary judgment being repugnant to the 5th, 7th and 14th Amendments, requiring 1,570 words. I was confined to 7,000 words. This ground was also covered extensively in a motion for reconsideration (Doc.57).

In closing: "The first maxim of a man who loves liberty, should be never to grant to rulers an atom of power that is not most clearly and indispensably necessary for the safety and well being of society." -- Richard Henry Lee, great-uncle of Robert Edward Lee and a signer of The Declaration of Independence.

SECTION IV.

As a first look, can substantive law in any state be used in Fed.R.Civ.P. 56, summary judgment, to decide sufficiency of the evidence? Rule 56 is procedural in federal court and must comply with the 5th & 7th Amendments. Judge-made state law does not, at present, have to comply with the 7th Amendment. Compliance with the 5th Amendment on Rule 56 would evoke precedent in this Court and rulings from

other circuits.

Kirkland's Reply Brief P.17-18:

"There is considerable authority from other jurisdictions that a cause of action does not accrue under such circumstances **until the plaintiff discovers or with reasonable diligence should have discovered** not only the injury but the cause of the injury. See R. J. Reynolds Tobacco Co. v. Hudson, 314 F2d 776 (5th Cir. 1963); Miller v. Beach Aircraft Corp., 204 Kan. 184 (460 P2d 535) (1969); Wiggington v. Reichold Chemicals, Inc., 133 Ill. App. 2d 776 (274 NE2d 118) (1971); Breaux v. Aetna Cas. &c. Co., 272 FSupp. 668 (E. D. La. 1967); Goodman v. Mead Johnson & Co., 388 FSupp. 1070 (D. N.J. 1974); Thrift v. Tenneco Chemicals, Inc., 381 FSupp. 543 (S. D. Tex. 1974); Gilbert v. Jones, 523 SW2d 211 (Tenn. Ct. App. 1974); G. D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22 (122 Cal. Rptr. 218) (1975); Allen, Roman v. A. H. Robins Co., Inc., 518 F2d 970 (5th Cir. 1975) (Tex.); Raymond v. Ely Lilly Co., 117 N.H. 164 (317 A2d 170) (1977); Harig v. Johns-Manville Products, 284 Md. 70 (394 A2d 299) (1978); Insurance Co. of North America v. Forty-Eight Insulations, Inc., 451 FSupp. 1230 (E.D. Mich. 1978); Schiele v. Hobart Corp., 284 Or. 483 (587 P2d 1010) (1978)." *KING v. SEITZINGERS, INC. et al., 62653 (160 Ga. App. 318) (287 SE2d 252) (1981).*

This Court must adhere to precedent from The 5th Circuit.

Can judge-made law in Florida or Georgia trump 5th Circuit precedent regarding the discovery rule. Can judge-made law in either state force Kirkland to use his broken brain to self-diagnose his broken brain, force him to self-diagnose PTSD and its co-morbid conditions of Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) in order to report them to an insurance company?

See Kirkland's attached affidavit concerning when

he was diagnosed with a disabling condition of any kind.

The panel cites *Reliance,* a 1940 case, and *N. Am. Ins. Co.,* a 1909 case. Is anyone watching this? Both cases are so out of date that they have absolutely nothing to do with current law. But, *Reliance* does enunciate the discovery rule:

> "It seems to be settled law in Florida that a default in serving notice or proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or unreasonable and the insured has not failed to use due diligence."

Reliance Life Ins. Co. of Pittsburgh, Pa. v. Lynch. (197 So. 723, 724) (1940).

Kirkland could not report his disability to the insurance company until he was diagnosed. Guardian has never argued in any court that Kirkland did not exercise "due diligence."

Again the Panel has deprived Kirkland of 5th Amendment Due Process by totally ignoring his argument. The Panel does not mention that Kirkland's Reply Brief argued at P.10-P.21, citing a dozen authorities, that Florida's judge-made law [see *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1287 (S.D.Fla.2001)]* presumes prejudice and thus is contrary to Georgia's public policy. Georgia's judge-made law applies the discovery rule.

Georgia's law:

> The time limitations in policies of insurance requiring a report of incident 'as soon as practicable' are subject to a factual determination. 'The questions of the sufficiency of the excuse offered, and the diligence of the beneficiary in giving the notice after the removal of the

disability, are generally questions of fact, to be determined by the jury, according to the nature and circumstances of each individual case.' North American Accident Ins. Co. v. Watson, 6 Ga. App. 193, 196 (64 SE 693); Pilgrim Health &c. Ins. Co. v. Chism, 49 Ga. App. 121 (3) (174 SE 212); Hulme v. Mutual Benefit &c. Assn., 60 Ga. App. 65 (2 SE2d 750).

When the testimony of record indicates that the first time any substantial evidence of a claim came to the attention of the principal insured he notified the agent as indicated in Division 1 of this opinion, about 19 months after occurrence of the incident giving rise to the claim, it was not error to submit the issue of reasonableness of excuse to the jury, and the jury finding was supported by the evidence.

NORFOLK & DEDHAM MUTUAL FIRE INSURANCE COMPANY v. CUMBAA., 47646.
128 Ga. App. 196, 198-199 (2) (196 SE2d 167) (1973).

Kirkland specifically asked the Panel at P.20 of the Reply Brief to certify a question to the Georgia Supreme Court. Instead the Panel actually cites *Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003)* wherein the Georgia Supreme Court complains of previous "public policy" decisions made in its behalf. *Convergys* cites:

Since the injured party in this case is a Georgia resident, compare Cunningham v. Equitable Life Assur. Society of the United States, 652 F2d 306 (1) (2d Cir. 1981), we likewise reject Federal's argument that we should afford comity to Florida's public policy in deterring aggravated conduct in that state by disallowing insurance coverage for punitive damages. Florida's public policy is not paramount. This case involves a Georgia corporation's liability to a Georgia resident, so the public policy of Georgia is superior to that of Florida. See General

Motors Corp. v. Nat. Auto Radiator Mfg. Co., 694 F2d 1050 (6th Cir. 1982); Andrews, supra. Georgia's public policy concerns are the protection of both the injured party and the insured. See GEICO, supra. This case, as others, turns on its own particulars.

FEDERAL INSURANCE CO. v. NATIONAL DISTRIBUTING CO., INC.; and vice versa, A91A1709, A91A1710 (203 Ga. App. 763) (2) (417 SE2d 671) (1992).

Pursuant to *Federal,* Georgia's law holds that Guardian is a resident Corporation:

> Additionally, in Allstate Ins. Co. v. Klein, 262 Ga. 599 (422 SE2d 863) (1992), the Supreme Court of Georgia examined the definition of nonresident in the Georgia Long Arm Statute (OCGA 9-10-90) and held that "a corporation which is 'authorized to do or transact business in this state at the time a claim' arises is a 'resident' for purposes of personal jurisdiction over that corporation in an action filed in the courts of this state. As a resident, such a foreign corporation may sue or be sued to the same extent as a domestic corporation." Id. at 601, n. 2 and accompanying text.

Harry S. Peterson Co., Inc. v. National Union Fire Insurance Co., A93A0564. (209 Ga. App. 585) (434 SE2d 778) (1993)

Federal is the closest Georgia's supreme court has come to the circumstances of this case, though it is not precise enough. I would ask the Court again to certify this question to The Supreme Court of Georgia.

The panel has deprived Kirkland of his 10th Amendment right to live in Georgia under its constitution and its laws, free of federal interference; and as well encroached on the sovereignty of the state. The holding also conflicts with The Supreme Court in *Bradford Electric*

Light Co., Inc. v. Clapper, 286 U.S. 145 (1932); and the Georgia Supreme Court's holding in *Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003).*

SECTION V.

The Panel cites *Pioneer* for the proposition that a litigant may file his motion to extend the time to answer one day after the deadline to file the complaint. *Pioneer* itself cites *Re South Atlantic* and *Klapprott v. United States:*

> Thus, in In re Underground Utility Construction Co., 35 B.R. 588 (Bankr.S.D.Fla.1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimely filing was the result of his failure to mail his claim to the proper address. *In Re South Atlantic Financial Corp., 767 F.2d 814, 817 (1985).*

The Panel's holding is contrary even to *In Re South Atlantic.* Moreover, comparing a late filing in a bankruptcy case to the late filing of a complaint is apples to oranges. Answering a complaint is governed by the Federal Rules of Civil Procedure. In *Klapport* below, the Supreme Court held that in order to show excusable neglect under Fed.R.Civ.P. 60(b), Klapport had to be destitute, and in jail:

> For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings.

Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).

Defendant's counsel was neither destitute nor in jail at the time that he inadvertently and incorrectly marked

his desk calendar. The Panel's holding conflicts with the Supreme Court. The Supreme Court has NEVER ruled that a defendant may file his motion to extend one day after the deadline for the answer. If they had, the Panel would have cited the case.

SECTION VI.

The Panel cites *Esfeld* for the proposition that Guardian did not have to adhere to the substantive law of the state of Georgia, OCGA 9-10-111. *Esfeld* at page 1306 cites *Gasperini:*

> Informed by these decisions, we address the question whether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court"? Id., at 468, n. 9.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).

Failure to apply Georgia's Substantive law, OCGA 9-10-111, in federal court discriminates "against citizen[s] of the forum state," Kirkland; and, made Guardian "choose the federal court" because under OCGA 9-10-111 an officer of the corporation would have to swear that no "interstate fraud," Mail and Wire fraud was committed.

SECTION VII.

The Panel at page 9: "a district judge's decision on whether to recuse himself." The Panel is ruling as if Kirkland filed under 28 USC 455 but admits that Kirkland actually filed under 28 USC 144. The Panel cites *Hamm:*

Two statutes govern the recusal of a federal district judge. 28 U.S.C.A. §§ 144, 455. . Section 144 provides for recusal when a party files a timely and technically correct affidavit and motion alleging the judge before whom the matter is pending is personally biased or prejudiced against him or in favor of an adverse party. Section 455 sets forth a general rule that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned, 28 U.S.C.A. § 455(a), and also several specific situations in which a judge must do so. 28 U.S.C.A. § 455(b).

The plaintiff in this case invoked neither statute in the district court....

Hamm v. Members of BD. of Regents of State of Fla. 708 F.2d 647, 651 (1983).

As the Panel admits, Plaintiff Kirkland invoked 28 USC 144 in the district court. Bias does not have to be proven. Recusal is "mandatory" and "automatic" if the affidavit is "technically correct." See *U.S. v. Sykes, C.A.7 (Wis.) 1993, 7 F.3d 1331.* See also Brotherhood of *Locomotive Fireman and Engineman v. Bangor & A.R. Co., C.A.D.C.1967, 380 F.2d 587.* The Panel's holding has deprived Kirkland of the plain language of 28 USC 144; and, 5th Amendment Due Process.

SECTION VIII.

Kirkland's Reply Brief at page 22:

Kirkland's Motion (Doc.26). His Reply (Doc.41,P.2-8) cites seven authorities, most particularly the Middle Districts own case *Cowart v. Metropolitan Life Ins. Co., 444 F. Supp. 2d 1282, 1295 (M.D. Ga. 2006)* granting plaintiff's motion to amend where defendant was "on notice" of a potential claim since the inception of the

lawsuit.)."

The panel cites *Smith*. This case is distinguishable from *Smith* for the following reasons: Smith agreed to the scheduling order, Kirkland had it forced on him while he moved the district court for time to find an attorney. Smith was not looking for an attorney. Smith did not file in state court in ignorance of a federal removal statute. Smith had been working and was not 100% disabled both mentally and physically. In *Smith,* the court did not rule on his motion but reserved it and summary judgment on the main claim made the motion moot. Kirkland filed both the motion and the amended complaint at the same time.

At page 1366 *Smith v. School Bd. Of Orange County (487 F.3d 1361) (11th Cir. 2007)* cites *Sosa:* "The record makes clear that Sosa's failure to comply with the court's scheduling order resulted from a lack of diligence in pursuing her claim." *Sosa v. Airprint Systems, Inc. (133 F.3d 1417, 1419) (11th Cir. 1998).*

Sosa was represented by counsel. I showed no "lack of diligence," just complete inability due to disability and not being a lawyer.

Notes of the Advisory Committee on 1983 amendments to Fed.R.Civ.P. 16:

Para.2: "In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome."
Para.3: "Second, the result frequently is nothing but a formal agreement on minutiae."
Para.4: "When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. ...But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case."
Para.5: "However, although scheduling and pretrial

conferences are encouraged in appropriate cases, they are not mandated."
Subdivision (e), Pretrial Orders, para3: "Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, e.g., Clark v. Pennsylvania R.R. Co., 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next."

To issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically, Plaintiff, a scheduling order, that was not even "mandated" by congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.* Putting unnecessary restrictions on amending a complaint also conflicts with *Foman v. Davis, 371 U.S. 178 (1962).*

If both this error and summary judgment are reversed, Kirkland can then pursue the entirety of his claim.

SECTION IX.

The Panel attempts to argue that it is my *pro se* status that prevented me from "litigating" this case. IT IS MY DISABILITY. I also missed the deadline for filing Record Excerpts in this Court. See my FORTY-ONE count affidavit in my Motion to Reinstate for how my multiple disabilities affect my ability to function.

Here again, to issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically,

Plaintiff, a scheduling order, that was not even "mandated" by congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.* This holding is also contrary to Congressional intent.

If both this error and summary judgment are reversed, Kirkland can then pursue the entirety of his claim.

SECTION X.

The Panel states that Kirkland's brief was filed on August 13th, 2007. It is my recollection that Guardian did not move the district court even by the September 2nd, 2007 deadline for an extension of time within which to file their brief.

SECTION XI.

Kirkland specifically raised the argument concerning RICO at #10 at P.27-28 of Appellant's Initial Brief asking the Court to review his motion for summary judgment, specifically the affidavit. The Panel cites *Four Seasons* which in turn cites *APA Excelsior III L.P.:* [W]e do not consider claims not raised in a party's brief initial brief and made for the first time at oral argument." *APA Excelsior III L.P. v. Premiere Technologies (476 F.3d 1261, 1269) (11th Cir. 2007).*

Kirkland raised the argument in his "initial brief."

Regarding Notice of Claim, the Panel cited *Nat'l Gypsum,* a 1982 surety bond case, from the Supreme Court of Florida and completely distinguishable from this case.

More on point is *American,* The Florida Second District Court of Appeal:

> '[A]s soon as practicable' has been construed to mean that notice is to be given with reasonable dispatch and within a reasonable time *in view of all the facts and*

> *circumstances of the particular case.* ...[It] being frequently stated that prejudice is presumed under these circumstances. *This does not mean upon a showing of delay, alone, the insurer walks out of court free of potential claims.*

American Fire and Casualty Co. v. Collura (163 So.2d 784, 792) (1964).

Precisely on target is *Lane* originally cited by Guardian without a careful reading:

> It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease.

Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001). The United States District Court for the Southern District of Florida encompasses Miami-Dade County where the contract was delivered in 1984.

Under Florida law it was not "reasonably possible" for me to give notice to Guardian until my symptoms were first "diagnosed" as Post Traumatic Stress Disorder or its co-morbid conditions of Electro Magnetic Hypersensitivity and Multiple Chemical Sensitivity. My disability began in 1993, I immediately informed Guardian in 2004 when I was first diagnosed with any disabling condition. See my affidavit attached to this petition.

The Panel engages in a bit prevarication by stating "Kirkland knew that he was suffering from a number of physical symptoms." None of those symptoms however, while seeing numerous doctors, and exercising due diligence was ever diagnosed.

I have encountered much adversity in my life. I have been beaten in the street by members of Georgia law

enforcement while I was handcuffed. But perhaps the worst beating of all is the beating that I have taken in Georgia's courts.

CONCLUSION

Mr. Justice Story:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . .

Parsons v. Bedford, 3 Pet. 433, 446, 7 L. ed. 732, (1830).

Respectfully submitted,

P.O.B. 773
Hull, Ga. 30646
706.788.3158

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

9/9/2009

Date

AFFIDAVIT OF DWAIN LEE KIRKLAND SUPPORTING APPELLANT'S PETITION FOR EN BANC REHEARING

Before the undersigned, an officer duly authorized to administer oaths, came Dwain Lee Kirkland, who, being duly sworn, deposes and states that all of the following is based on personal knowledge and is true and correct:

My name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

1.

I believe, based on personal knowledge, that Defendant Guardian et al will terminate my disability benefits, without cause, once they are beyond the jurisdiction of this court.

2.

I have suffered from Post Traumatic Stress Disorder (309.81) since the age of at least seven, from Depressive Disorder NOS (not otherwise specified) (311) since the age of eight, and Personality Disorder NOS (not otherwise specified) (301.9) since the age of possibly seven. These mental disorders were not diagnosed until November 2004 when I was forty-nine years old. They were the result of child abuse. I am currently fifty-four. See Count 26 of the original verified complaint, Tab 00 in the Record Excerpts.

3.

I have suffered from adrenal insufficiency since at least the age of fourteen and Chronic Fatigue Syndrome (G93.3), since the onset of my disability in March 1993, except for a period of remission in 2000 due to treatment with N.A.E.T., an allergy elimination technique. See Count 43 of the original verified complaint, Tab 00 in the Record Excerpts.

4.

I am currently receiving, and have received, total disability benefit payments from Defendant Guardian et al since March 2003. I am, and have been, totally disabled throughout the entirety of these court proceedings, both in the district court and this appellate court. The District Court acknowledged that Defendant Guardian has not disputed, with admissible evidence, that I was totally disabled as of March 1993. See the May 5th, 2008 order, Tab 55 of Record Excerpts.

5.

I have an 11th grade education, no formal training in the law; and would never, in my current condition, excepting for the inability to procure counsel, attempt to litigate a case in any court other than traffic or small claims.

6.

I have attempted to find counsel before the filing of this case, after the filing of this case, in the district court, and during the process of these appellate proceedings. I have gone as far a field as East Texas; Pittsburgh, Pennsylvania and Washington, D.C. I have prevailed on both presidential candidates, one vice presidential candidate, and one member of the Senate Judiciary Committee. I have not, at this time, found anyone to represent me.

7.

The first reason for my filing this case pro se was my inability to obtain counsel, the second reason being the possibility of the entire suit being foreclosed by the statute of limitations and the third reason being that a successful pursuit of this action may be the only way for me to avoid homelessness and subsequent death.

8.

I asked for and was granted one extension of time in the trial court. missed three deadlines and was penalized for them all.

9.

Defendant Guardian et al asked for numerous extensions, answered the complaint after the deadline, without filing a motion for an extension till after the deadline, missed two other deadlines and was forgiven for them all.

10.

My condition has never been good. I have been totally or residually disabled since March 1993, a period of 15 years.

11.

I have not left the state of Georgia since I arrived here in November 2002.

12.

I have rarely, in the past six years, traveled outside the adjoining Georgia counties of Madison, Clarke, Oconee, Franklin and Banks.

13.

Some of the bedclothes on my bed have not been changed since the beginning of winter 2007.

14.

None of the clothes I am currently wearing have been changed in 3 weeks to a month.

15.

At times during the last three months, I have been unable to take a bath or shower for ten days.

16.

My definition of "emotional exhaustion" is when I completely lose the will power to pursue a given matter and begin to fear that if I continue in that same direction, something inside of me will break.

17.

My definition of "physical exhaustion" is when I become so unsteady on my feet that I am afraid that, if I do not go somewhere and sit or lie down, I will fall and injure myself.

18.

I suffer from both emotional and physical exhaustion on a daily basis.

19.

My anxiety disorder, Post Traumatic Stress Disorder, is the cause of my chronic fatigue. I discovered this within the last ten days. I have never, to my knowledge, since the onset of my total disability, been diagnosed or alluded to by my own healthcare providers as being delusional.

20.

At present, a good week for me consists of some activity on Monday, Tuesday, Thursday and Friday interspersed with naps and bed rest; and naps and complete bed rest on Wednesday, Saturday and Sunday.

21.

At present, a mediocre week for me consists of some activity interspersed with naps and bed rest and the ability to get out of bed and feed myself when I'm hungry. Within the last three weeks, I did however consider calling 911 on one occasion because I was unable to go to the grocery store two miles distant to acquire food.

22.

At present, a bad week for me consists of almost no activity, almost exclusive naps and bed rest.

23.

Almost all my meals are canned or prepackaged. I rarely cook anything except for popcorn and eggs. I have a folding chair in front of the stove should I need to sit down.

24.

I am heterosexual. I have no wife or girlfriend. I have had no significant contact with a member of the opposite sex since I moved to Georgia in 2002.

25.

I filed the original complaint in Athens-Clarke county Georgia state court. I had no knowledge of the federal removal statutes. I have knowledge of state court pleading and appeals and certiorari to the Supreme Court of the United States. Prior to this case, I had never been in a federal court. Federal court pleadings and appeals are two to three times as complex and labor intensive as state court.

26.

At the outset of this case, I was aware of my worsening condition and my physical limitations to filing in both the trial and this appellate court. From October 20th, 2008 to November 4th, 2008, I attempted simultaneously via fax and phone to find someone to represent me in a 42 USC 1983 state court action and in this court. It was both very emotionally and physically draining to be rebuffed time and time again.

27.

Pursuant to Counts 1 to 26 above, I at all times during the course of the trial court proceedings and this appeal endeavored in good faith and to the utmost of my ability to meet the filing requirements of both courts. I especially endeavored to file the brief and record excerpts, as soon as I was physically able, in order not to prejudice the Defendants in any way.

28.

I referred to Dr. Kirk Melville, reported to be the great-great grandfather of "Moby Dick" author Herman Melville in Count 41 of my affidavit supporting my motion to reinstate and file out of time in this Court. He practices medicine in Oconee county, Watkinsville Georgia. I first saw him on May 25th, 2009. He diagnosed me with adrenal insufficiency and Chronic Fatigue Syndrome (G93.3), on June 17th, 2009 and began treatment, due to my sensitivity to drugs and chemicals with Cordyceps, a natural food supplement, and Cortisol Manager™ (CM), an herbal compound. After taking CM for five days, I completely lost my ability to function and had to discontinue it and use only Cordyceps for five days to build myself up, and then took one CM per day rather than the two prescribed. I eventually took one Cordyceps and one CM twice daily to offset each other. I saw Dr. Melville again on July 20th, 2009. He ordered blood antibody tests for Epstein-Barr and Cytomegalovirus. I was later found to be negative on both. On or about July 24th, 2009, I developed obvious trembling in both hands. I recognized it as an "artificial deficiency" created by the herbal supplement. I had experienced a similar situation in 2005 when an M.D. intravenously fed me with vitamins and minerals but not trace minerals. The herb in question had only a small number of compounds so I was able with a book, *Prescription for Nutritional Healing*, to identify which phytochemical compound had caused the "artificial deficiency." I was then able to isolate

a compound in the same family to stop the hand trembling. Over the course of the next ten days, this happened again on two more occasions: a sensation of internal trembling from sternum to vagus nerve, and an extreme mental fatigue. Each time I was able to locate a phytochemical and herb to militate against the symptoms. At the end of this time, I was still bingeing on pizza and ice cream for the mineral Germanium in spite of using Siberian Ginseng for the same reason. I eventually surmised that I was using food and Ginseng in an attempt to end run another deficiency. Looking back to vitamins and minerals, I realized that in all my hair-mineral analysis supplementation since 2003, I had somehow missed the B-complex vitamin Choline, as an individual supplement though I had individually supplemented with both PABA and Inositol. I acquired an herb high in Choline, and Lecithin at Walmart, and began supplementation. For the first time ever, I began to slightly improve. The Central Nervous System (CNS) uses Choline as a buffer when the three CNS enzymes mentioned above reach a certain stage of depletion. Robbing Choline from its duties in assimilating other vitamins and minerals is what causes Chronic Fatigue Syndrome (G93.3). I then identified the three "artificial deficiency" symptoms (hand trembling, sensation of internal trembling, extreme mental fatigue), as being caused by Central Nervous System (CNS) enzyme depletion. I do not know which enzymes are depleted but I do know which herbal compound supplements those enzymes. Thus I have a cure though no absolute theoretical understanding of the disease. Within the last ten days, I identified the internal trembling sensation from sternum to vagus nerve as being the same enzyme deficiency that causes both my Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH). I eventually realized through further study and comparison of my illnesses that all anxiety disorders, all inflammatory

disorders (chronic prostaitis and soft tissue injury from which I suffer), all chemical exposures and all electromagnetic field exposures deplete the same CNS enzyme. I have essentially found a possible cure for all aspects of Gulf War Syndrome, except the susceptibility to cancer, which is caused by at least one of the environmental exposures being a carcinogen.

29.

The panel in its holding required me to self diagnose both Post Traumatic Stress Disorder and its comorbid conditions Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) in March of 1993 in order to notify Guardian. I notified Guardian of my disabling hypersensitivity conditions in 2003, the first time that they became apparent to me. None of these sensations had been apparent to me at the outset. In regards to these experiences, Guardian's expert witnesses labeled me possibly "psychotic" but Guardian itself dragged me along for two years believing this but never adjusting my claim or giving me access to their doctors at their expense. Dr. Richard Born diagnosed me with PTSD in November 2004. Dr. Kirk Melville with Chronic Fatigue in June 2009. I have now diagnosed myself with Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) in August 2009. All of these diagnoses were made after I had notified Guardian of my disability. I cannot impart information to an insurance company that I do not know myself.

s/ Dwain Lee Kirkland

By Dwain Lee Kirkland

09/09/09

Date

s/ Teresa Cooper

Notary Public

My Comm. Expires: Mar 14, 2011

Affix notary seal here:

TERESA COOPER
NOTARY

EXPIRES
Mar. 14, 2011

PUBLIC
MADISON COUNTY
(Stamped)

Supreme Court, U.S.
FILED

No. 091228 JAN 19 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

APPENDIX SUPPLEMENT
PETITION FOR WRIT OF CERTIORARI

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Aug. 19, 2009
THOMAS K. KAHN
CLERK
(Stamped)

No. 08-15699
Non-Argument Calendar

D. C. Docket No. 06-00107-CV-CDL-3

DWAIN LEE KIRKLAND,

Plaintiff-Appellant,

versus

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Defendant- Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

(August 19, 2009)

Before BIRCH. BLACK and KRAVITCH, Circuit Judges.

PER CURIAM:

Dwain Lee Kirkland, pro se, appeals the grant of summary judgment to The Guardian Life Insurance Company of America (Guardian) in his private civil action alleging negligence, fraud, and breach of contract under state law. Kirkland alleges he entered into a private disability insurance policy (the Policy) with Guardian in the 1980s. He further alleges he became disabled under the terms of the Policy in 1993, but he did not realize that he was disabled until 2003, when he first filed a disability claim with Guardian. Guardian accepted his claim, with a disability onset date of March 2003, but denied his claim for back benefits from 1993 through 2003. Kirkland filed suit in Georgia state court, and Guardian removed the case to the district court based on diversity jurisdiction. The district court ultimately granted summary judgment to Guardian on all claims, and this appeal followed.

I.

As an initial matter, Guardian argues the only order properly before us on appeal is the final order issued by the district court on July 11,2008, (the Final Order), in which the court addressed only a single claim. Kirkland argues his notice of appeal indicated his intent to appeal all of the underlying orders from the district court.

Although Kirkland specifically stated he was appealing the Final Order, it is

apparent from the face of the notice of appeal that he intended to appeal all of the underlying orders. In particular, he asked that the district court clerk omit nothing from the record on appeal. Moreover, all of the

issues that Kirkland raises on appeal are interrelated, and Guardian has not argued that it was prejudiced by Kirkland's failure to more specifically identify the orders that he wanted to appeal. *See Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1313 (11th Cir. 2004); *see also Aaro, Inc. v. Daewoo Int'l (Am.) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985). Accordingly, we conclude that the notice of appeal was effective to appeal all the non-final orders issued prior to the Final Order. *See Ostemeck v. E.T. Barwick, Indus., Inc.*, 825 F.2d 1521, 1528 (11th Cir. 1987).

II.

Kirkland argues the resolution of his claims on summary judgment violated his right to a jury trial under both the United States Constitution and the Georgia Constitution.

We review questions of constitutional law *de novo*. *Loyd v. Ala. Dep't of Corrs.*, 176 F.3d 1336, 1339 (11th Cir. 1999). Generally, we will not consider an issue not raised before the district court. *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). Moreover, issues not briefed on appeal are deemed abandoned. *Id.* at 1330. An issue also may be deemed abandoned

where a party only mentions it in passing without providing substantive argument in support. *APA Excelsior III L.P. v. Premiere Techs.) Inc.*, 476 F.3d 1261, 1270 n.4 (11th Cir. 2007).

The Seventh Amendment provides that, in suits at common law, where the value in controversy exceeds $20, "the right of trial by jury shall be preserved[.]" U.S. Const.

amend. VII. Nevertheless, where there are no genuine issues of fact, "summary judgment decides only questions of law and does not deprive the losing party of its jury trial right." *Itel Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1261 (11th Cir. 1983).

As discussed below, there were no genuine issues of material fact in this case. Thus, the district court did not violate Kirkland's right to a jury trial under the Seventh Amendment. Moreover, because Kirkland did not argue before the district court that a jury trial was required under the Georgia Constitution, we do not address that claim on appeal. Similarly, we note that Kirkland refers on appeal to the Fifth and Fourteenth Amendments, but he does not make any substantive argument that the grant of summary judgment denied him due process. Accordingly, he has abandoned any such argument.

III.

Next, Kirkland contends that the district court improperly found that

(4)

Guardian was entitled to void a portion of the Policy which entitled him to residual disability benefits.

As noted above, we generally will not consider an issue not raised in the district court. *Access Now*, 385 F.3d at 1331. Whether Kirkland was entitled to residual disability benefits was never raised as an issue or argued before the district court. Accordingly, the court did not make any findings in this regard. Because the issue residual disability benefits was never raised before the district court, we will not address this issue on appeal.

IV.

Kirkland also argues that the district court erred in finding that Florida law, rather than Georgia law, applied in this case pursuant to the doctrine of *lex loci contractus.*

We review a district court's choice-of-law determination *de novo. Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assoc., Inc.*, 468 F.3d 1322, 1325 (11th Cir. 2006).

The parties here had a substantial relationship with Florida because Kirkland lived in Florida until November 2002, which was a few months before he first filed his notice of claim with Guardian, and because the Policy was delivered in Florida. *See Johnson v. Occidental Fire & Cas. Co. of N.C.*, 954 F.2d 1581, 1583-84 (11th

Cir. 1992). Both Florida and Georgia law require notice within a reasonable period of time, unless compliance is impossible or unreasonable, *compare Reliance Life Ins. Co. of Pittsburgh, Pa., v. Lynch*, 197 So. 723, 724-25 (Fla. 1940), *with N. Am. Ins. Co. v. Watson*, 64 S.E. 693, 695 (Ga. App. 1909), thus Florida law does not contravene Georgia public policy, *see Convergys Corp. v. Keener*, 582 S.E.2d 84, 85 (Ga. 2003). Thus, the district court correctly concluded Florida law applied in this case.

V.

Kirkland argues that the district court erred by allowing Guardian to file its answer to his complaint one day after the filing deadline. We review "the district court's determination of excusable neglect for abuse of discretion." *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996,997 (11th Cir. 1997).

After removal, a defendant who did not answer a

complaint before removal must answer, as relevant here, five days after the notice of removal is filed. Fed. R. Civ. P. 81(c)(2)(C). However, when an act must be done within a specified time, the district court may extend the time for good cause "if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). In analyzing excusable neglect, the court should look at (1) the danger of prejudice to the non-movant,

(2) the length of the delay and its possible impact on the judicial proceedings, (3) the reason for the delay, and (4) whether the movant acted in good faith. *Advanced Estimating Sys.*, 130 F.3d at 997-98. The Supreme Court has explained that excusable neglect can include an "inadvertent or negligent omission." *Pioneer Inv. Servo Co. v. Brunswick Assoc. Ltd. P'ship*, 113 S. Ct. 1489, 1498 (1993) (construing a Bankruptcy Rule).

Here, Guardian's counsel filed the answer one day after the deadline because he inadvertently forgot to change the deadline date on his calendar after filing the notice of removal one day earlier than expected. Guardian's counsel initially had planned on filing the notice of removal on December 8, 2006. Thus, the answer would have been due five days later, on December 15, 2006. However, Guardian's counsel actually filed the notice of removal one day earlier than planned, moving the due date for the answer up one day as well. Kirkland has not explained how he was prejudiced, in any way, by the one-day delay. Moreover, the delay was short and had no apparent impact on the proceedings. Kirkland also has not alleged that Guardian intentionally filed its answer late or otherwise acted in bad faith. Accordingly, the district court did not abuse its discretion by permitting Guardian to file the answer one day late.

(7)

VI.

Next, Kirkland argues that, because he verified his complaint, Guardian was required, under Georgia law, to verify its answer. Whether federal or state law applies in a diversity action is a question of law, which we review *de novo*. *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1306 (11th Cir. 2002).

In a diversity action, the federal court must apply state substantive law and federal procedural law. Id. In deciding whether state or federal law should apply to an issue, the court first looks to see whether the state and federal law conflict as to the disputed issue. *Id.* at 1306-07. Here, the state and federal laws conflict. *Compare* O.C.G.A. § 9-10-111, *with* Fed. R. Civ. P. 11(a). If the laws conflict, the court should determine "whether a congressional statute or Federal Rule of Civil Procedure covers the disputed issue." *Esfeld,* 289 F.3d at 1307. Here Rule 11(a), Fed. R. Civ. P., covers the disputed issue. Thus, the district court correctly found that federal law governed, *see Esfeld,* 289 F.3d at 1307, and Guardian was not required to verify its answer.

VII.

Kirkland also contends the district court should have granted his motion for recusal.

(8)

We review a district judge's decision on whether to recuse himself for an abuse of discretion. *Thomas v. Tenneco Packaging Co., Inc.,* 293 F.3d 1306, 1319-20 (11 th Cir. 2002). A judge must recuse himself when a party to a district court proceeding "files a timely and sufficient affidavit that the judge before whom the

matter is pending has a personal bias or prejudice either against him or in favor of an adverse party." 28 D.S.C. § 144. Generally, "bias sufficient to disqualify a judge must stem from extrajudicial sources, and must be focused against a party to the proceeding." *Hamm v. Members of Bd. of Regents of State of Fla.*, 708 F.2d 647,651 (11th Cir. 1983) (citations omitted). "An exception to that rule is made when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party." *Id.* However, adverse rulings do not constitute pervasive bias. *Id.*

In his motion for recusal, Kirkland only identified adverse rulings in support of his allegations of bias. He did not allege any extrajudicial sources of bias or refer to any remarks that demonstrated bias. Thus, the district court did not abuse its discretion by denying the motion for recusal.

VIII.

Kirkland next submits that the district court erred by denying him leave to amend his complaint to add violations of state and federal Racketeer Influenced

and Corrupt Organizations ("RICO") laws.

We review "the denial of a motion to amend a complaint for an abuse of discretion." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1300 (11th Cir. 2003). "[W]here a party's motion to amend is filed after the deadline for such motions, as delineated in the court's scheduling order, the party must show good cause why leave to amend the complaint should be granted." *Smith v. Sch. Bd. of Orange County*, 487 F.3d 1361, 1366 (11th Cir. 2007); *see also* Fed. R. Civ. P. 15(a).

Kirkland filed his motion for leave to amend the complaint four months after the deadline set by the district

court's scheduling order. Moreover, he failed to show good cause for allowing the amendment. Thus, the district court did not abuse its discretion by denying the motion.

IX.

Kirkland contends that the district court erred by striking his proposed expert witness for failure to comply with Rule 26, Fed. R. Civ. P., but not striking Guardian's expert witnesses for the same reason.

A district court's discovery decisions are reviewed for an abuse of discretion. *Burger King Corp. v. Weaver,* 169 F.3d 1310, 1315 (11th Cir. 1999). The Federal Rules of Civil Procedure require the parties in a case to provide one

another with the identities of expert witnesses who may be used at trial to present evidence. Fed. R. Civ. P. 26(a)(2)(A). These disclosures must be made "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(C). "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61.

Here, Kirkland did not disclose his witness until three months after the disclosure was due. Moreover, he failed to provide a reason for his late filing, except to say that he had realized he was going to have to litigate his case *pro se.* However, Kirkland had been litigating his case *pro se* from the time he filed his complaint and he did not explain how his *pro se* status prevented him from filing a timely disclosure. Thus, the district court did not abuse its discretion by striking Kirkland's proposed expert witness. Moreover, assuming, *arguendo,* that the district court erred by not striking Guardian' s proposed expert witnesses, the error in no way affected Kirkland' s substantial rights

because Guardian did not submit any evidence from its expert witnesses in support of its summary-judgment motion.

X.

Kirkland further argues the district court erred by finding that Guardian's response to his summary judgment motion was timely. He asserts that he filed his

motion on July 30, 2007, and his brief in support on August 13, 2007, and he argues that Guardian was required to respond within 20 days after he filed the motion, rather than within 20 days after he filed the brief.

Under the Local Rules of the Middle District of Georgia, a party wishing to file a response to a motion must do so within 20 days "after service of movant's motion *and brief.*" M.D. Ga. L. R. 7.2 (emphasis added).

Within 20 days after Kirkland filed his brief in support of his motion for summary judgment, Guardian received an extension of time to file its response by September 14, 2007. Guardian then filed its response before the expiration of the extended deadline. Accordingly, the district court correctly concluded that Guardian's response was timely and did not err in declining to strike it.

XI.

Finally, Kirkland argues the district court erred by granting summary judgment to Guardian and by denying him summary judgment. Kirkland submits that he asserted three theories of recovery: breach of contract, fraud, and violations of RICO laws. However, he does not discuss the fraud or RICO claims on appeal, but, instead,

only refers to documents filed in the district court. Thus, he has abandoned these claims. *See Four Seasons Hotels & Resorts, B. V. v. Consorcio Barr S.A.,* 377 F.3d 1164, 1167 n.4 (11th Cir. 2004) (holding that a party may not

incorporate by reference arguments presented to the district court, but must specifically and clearly identify the issues presented for review, with citations to the authorities and portions of the record on which the party relies).

We review a district court's grant of summary judgment *de novo,* applying the same standards that were to be applied in the district court. *Rojas v. Florida,* 285 F.3d 1339, 1341 (11th Cir. 2002). Issues not briefed on appeal are deemed abandoned. *Horsley v. Feldt,* 304 F.3d 1125, 1131 n.l (11th Cir. 2002).

Under Florida law, a party's failure to comply with the notice requirements of an insurance policy may be excused where the party's circumstances make compliance impossible or unreasonable and the insured has acted with due diligence. *Reliance,* 197 So. at 724. In *Reliance,* the court found that the policyholder's failure to give timely notice was excused where he was stricken with a disease that confined him to his bed and caused him to be delirious most of the time. *Id.* at 723.

"When notice of a possible claim is not given to an insurance company, prejudice is presumed, but recovery is not precluded if the insured can demonstrate lack of actual prejudice." *Nat'[Gypsum Co. v. Traveler's Indem. Co.,* 417 So. 2d 254, 256 (Fla. 1982). An insured may show a lack of prejudice to an insurer by demonstrating, for example, that another insurer or other competent person

investigated the matter and turned the results over to the current insurer. *Collura,* 163 So. 2d at 792.

Kirkland failed to provide Guardian with a timely notice of claim, as required by the Policy. There were no genuine issues that Kirkland knew that he was suffering from a number of physical symptoms, that he was unable to work between 1993 and 2003, or that he waited over 10 years before notifying Guardian of his inability to work. Thus, the district court did not err in finding, as a matter of law, that Kirkland failed to give notice of his disability within a reasonable time.[1] Kirkland also did not overcome the presumption of prejudice that arose in Guardian's favor upon his failing to give timely notice of his claims. Guardian was, thus, entitled to summary judgment on the breach-of-contract claim. Moreover, Kirkland has waived all other relevant issues by failing to discuss them on appeal.

Upon review of the record and consideration of the parties' briefs, we affirm.

AFFIRMED.

[1] Kirkland also contends on appeal that the district court erred by finding that he was required to give proof of loss within 90 days after the end of the first 30-day period for which he claimed that Guardian was liable under the Policy. It appears that the district court correctly construed the Policy as to this requirement. In any event, even if there was a genuine issue as to whether Kirkland's proof of loss was timely, there was no genuine issue as to his failure to provide a timely notice of claim, which precluded his recovery under the Policy.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

RECEIVED
CLERK'S OFFICE
08 OCT 3 - PM 2:00
U.S. DISTRICT COURT
MIDDLE DIST. OF GEORGIA
ATHENS, GEORGIA
(Stamped)

Dwain Lee Kirkland,)
Plaintiff)
v.)
)
The Guardian Life)
Insurance Company of)
America and Others,)
Defendants.)

Civil Action
Case No. 3:06-CV-107 (CDL)

NOTICE OF APPEAL

Notice is hereby given that Dwain Lee Kirkland, Plaintiff, in the above-named case, hereby appeals to The United States Court of Appeals For The 11th Circuit from an order granting summary judgment to the defendants on the last of Plaintiff's claims, entered in this action and filed with the court on July 11th, 2008. Plaintiff timely filed a Motion for Reconsideration of said order (68) on July 25th, 2008. Defendants timely filed a motion for extension of time to respond (69) on August 1st, 2008. Said motion was granted by the court on August 4th, 2008 giving Defendants till August 21st, 2008 to respond. Defendants did respond (71) to Plaintiff's Motion for Reconsideration on August 21st, 2008. The trial court issued an order disposing of Plaintiff's motion on September 3rd, 2008. Due to the 30 days in September, this Notice of Appeal is due on Friday October 3rd, 2008, and is being filed and served as of that

date.

The clerk will please omit the following from the record on appeal:

1. None.

The clerk will please include the following from the record on appeal:

1. All, the entire record, including a certified copy of the record of The Athens-Clarke County Superior Court, the state court from which this action was removed.

No transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

STATEMENT

The district court's order of May 5th, 2008 granted partial summary judgment to Defendants allowing them till June 4th, 2008 to supplement their motion for summary judgment on the issue of whether all premium waiver amounts due Plaintiff had been paid. Said order states in the Conclusion section at page 35: "The Court grants Defendant's Motion for Summary Judgment (Doc. 27) in part and denies it in part. Further, **the Court permits Defendant to supplement its Motion for Summary Judgment within thirty days** with evidence establishing that it has refunded and/or waived Plaintiff's premiums in accordance with the Policy. Plaintiff will have twenty days to respond to any such filing with evidence establishing that he has paid the disputed premiums and that the premiums have not been refunded. IT IS SO ORDERED, this 5th day of May, 2008."

The Defendants, subsequent to the May 5th, 2008 order, filed a motion for extension of time to file (58) the

referenced supplement on June 2nd, 2008. Said motion was granted by the district court on June 5th, 2008 allowing Defendants till June 18th, 2008 to supplement their motion and Plaintiff till July 8th, 2008 to respond. Defendants timely filed their supplement (62) on June 18th, 2008. Plaintiff timely filed his response to that supplement (65) on July 8th, 2008. The district court entered an order disposing of Plaintiff's remaining claim on July 11th, 2008 believing, based on Plaintiff's response, that Defendant Guardian had issued checks for all amounts owed to Plaintiff. Subsequent to the court's order, one of the checks for $409.50 issued Plaintiff by Defendant Guardian bounced. Plaintiff received a two-sided single page document from his bank apprising him of this fact on Monday July 21st, 2008. Plaintiff timely filed a Motion for Reconsideration of the district court's order (68) on July 25th, 2008 asking that the $409.50 check be made good by requiring Defendant Guardian to deposit said amount with the court for disbursement to Plaintiff. Defendants timely filed a motion for extension of time to respond (69) to Plaintiff's motion for reconsideration on August 1st, 2008 saying that the $409.50 in question may have "escheated" to the state of Georgia and the employee who kept those records was on vacation and would not return till August 11th, 2008. Said motion was granted by the court on August 4th, 2008 giving Defendants till August 21st, 2008 to respond. Defendants did respond (71) to Plaintiff's Motion for Reconsideration on August 21st, 2008. The trial court issued an order disposing of Plaintiff's motion on September 3rd, 2008. Due to the 30 days in September, this Notice of Appeal is due on Friday October 3rd, 2008, and is being filed and served as of that date.

The above scenario is accomplished pursuant to FRAP 4(a)(4)(A)(iv):

(4) Effect of a Motion on a Notice of Appeal.
(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
(iv) to alter or amend the judgment under Rule 59;

See *Hilst v. Bowen, 874 F.2d 725 (10th Cir. 1989)* at page 726:

The district court correctly construed Hilst's motion for reconsideration as one pursuant to Rule 59(e). See Autorama Corp. v. Stewart, 802 F.2d 1284, 1286 (10th Cir.1986). Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that if a timely Rule 59(e) motion is made, the time for appeal begins to run from the entry of the order disposing of the motion.

The only requirement for Plaintiff's Rule 59(e) motion for reconsideration was that it be timely. The order which the motion sought to alter was filed on July 11th, 2008. Plaintiff's motion for reconsideration was filed 14 days later (ten business days having excluded the weekends of July 12th & 19th pursuant to local rules) on July 25th, 2008. In *Hilst* supra at page 726 the same 14 days applied:

The district court granted defendant's motion to dismiss by its Memorandum and Order filed August 4th, 1987. On August 18, Hilst filed a motion for reconsideration.

In the case at bar, the district court disposed of Plaintiff's motion for reconsideration on September 3rd, 2008. Pursuant to FRAP 4(a)(4)(A)(iv) supra, Plaintiff had 30

days, until October 3rd, 2008 to file a timely Notice of Appeal.

Pursuant to the above, this appeal is ripe for adjudication.

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

10/03/2008

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charqes, download a copy of each document durinq this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court [LIVE AREA]
Georgia Middle District

Notice of Electronic Filing

The following transaction was entered on 9/3/2008 at 4:26 PM EDT and filed on 9/3/2008
Case Name: Kirkland v. The Guardian Life Insurance Company of America
Case Number: 3:06-cv-107
Filer:
WARNING: CASE CLOSED on 07/11/2008
Document Number: No document attached

Docket Text:
This Is a text only entry; no document issued. ORDER denying [68] Motion for Reconsideration Ordered by Judge Clay D. Land on September 3, 2008 (CDL)

3:06-cv-107 Notice has been electronically mailed to:

H. Sanders Carter, Jr sanders.carter@smithmoorelaw com, donna.davis@smithmoorelaw com

Lisa Renee Richardson lrichardson@mfllaw.com

Michael Patrick Johnson
michael.johnson@smithmoorelaw.com,
dawn.smith@smithmoorelaw.com

3:06-cv-107 On this date, a copy of this document, including any attachments filed with this document, has been mailed by United States Postal Service to any non CM/ECF participants in this case as indicated below::

Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

RECEIVED
CLERK'S OFFICE
08 JUL 25 - PM 3:32
U.S. DISTRICT COURT
MIDDLE DIST. OF GEORGIA
ATHENS, GEORGIA
(Stamped)

Dwain Lee Kirkland,)
Plaintiff)
v.)
)
The Guardian Life)
Insurance Company of)
America and Others,)
Defendants.)

Civil Action
Case No. 3:06-CV-107 (CDL)

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S JULY 11TH, 2008 ORDER

Comes now Plaintiff DWAIN LEE KIRKLAND and makes and files his Motion for Reconsideration of the July 11th, 2008 Order. Pursuant to Local Rule 6.3(a)(1), the District Court's July 11th, 2008 final order was filed and served via the U.S. Mail on Friday July 11th, 2008 making Plaintiff's Motion for Reconsideration with the ensuing weekends of July 12th & 19th and 3 days mailing due on Monday July 28th, 2008, 17 days hence the mailing of the order per the rule. This motion is being filed on or before Monday July 28th, 2008.

1.

After filing Plaintiff's Response to Defendant's Supplement with The Court on July 8th, 2008, Plaintiff deposited in his bank the three checks totaling approximately $2200 that Defendant Guardian had issued as amounts due him for premiums paid during the premium waiver period of the policy.

(1.)

2.

The earliest check for $409.50 issued on March 4th, 2005, a copy of which, along with its cover sheet, was attached to Plaintiff's original affidavit as Exhibit G, bounced: was not honored by Defendant's bank. Plaintiff received a two-sided single page document from his bank apprising him of this fact on Monday July 21st, 2008. See Plaintiff's affidavit filed herewith, a two page copy of said document being attached as Exhibit A.

WHEREFORE, Plaintiff prays that an order do issue causing Defendant to deposit with The Court, via cash or money order, for disbursement to Plaintiff, the aforementioned $409.50 so that Plaintiff does in fact receive all amounts due him without further delay.

That Plaintiff receive such other and/or further relief as may be due and granted under the rules of this court, the laws of the State of Georgia, and the laws of The United States of America.

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

7/25/2008

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

(2.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

RECEIVED
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08 JUL 25 - PM 3:33
U.S. DISTRICT COURT
MIDDLE DIST. OF GEORGIA
ATHENS, GEORGIA
(Stamped)

Dwain Lee Kirkland,)
Plaintiff)
v.)
)
The Guardian Life)
Insurance Company of)
America and Others,)
Defendants.)

Civil Action
Case No. 3:06-CV-107 (CDL)

BRIEF SUPPORTING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S JULY 11TH, 2008 ORDER

Comes now Plaintiff DWAIN LEE KIRKLAND and files with The Court Plaintiff's Brief supporting his Motion for Reconsideration of The Court's July 11th, 2008 Order.

STATEMENT OF FACT

Plaintiff's Response, filed July 8th, 2008, to Defendant's Supplement to the motion for summary judgment contained an affidavit showing that Defendant's had issued him over a course of time three checks totaling approximately $2200. Count 13 of Plaintiff's Response

affidavit read as follows:

13.

Along with an earlier check issued on March 12th, 2005, all premium amounts owed the Plaintiff appear to have been refunded at this time. Both a copy of the check and its cover sheet are attached as Exhibit G.

(1.)

ARGUMENT

Plaintiff intentionally chose the words "*appear to have been refunded at this time" in* Count 13 above because he had not yet actually collected the funds by cashing or depositing Defendant's three checks. Per Plaintiff's motion and affidavit filed herewith, when Plaintiff did in fact deposit the checks, the check mentioned in Count 13 above bounced: was not honored by Defendant's bank.

Plaintiff's request herein is very simple. He asks that The Court assist him in whatever manner possible (having Defendant deposit the funds with The Court, etc.) in collecting the $409.50 so that he does not have to undergo further distress and delay.

s/ Dwain Lee Kirkland

_____

Dwain Lee Kirkland, Pro se

7/25/2008

_____

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

RECEIVED
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08 JUL 25 - PM 3:32
U.S. DISTRICT COURT
MIDDLE DIST. OF GEORGIA
ATHENS, GEORGIA
(Stamped)

Dwain Lee Kirkland, Plaintiff	
v.	
The Guardian Life Insurance Company of America and Others, Defendants.	Civil Action Case No. 3:06-CV-107 (CDL)

AFFIDAVIT OF DWAIN LEE KIRKLAND SUPPORTING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S JULY 11TH, 2008 ORDER

Comes now Plaintiff DWAIN LEE KIRKLAND and files with The Court the affidavit of Dwain Lee Kirkland supporting Plaintiff's Motion for Reconsideration of The Court's July 11th, 2008 Order.

Before the undersigned, an officer duly authorized to administer oaths, came Dwain Lee Kirkland, who, being duly sworn, deposes and states that all of the following is based on personal knowledge and is true and correct:

My name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

I do hereby depose and swear that all the attached documents were made by me or at my direction and are true and correct copies of the originals.

(1.)

1.

After filing Plaintiff's Response to Defendant's Supplement with The Court on July 8th, 2008, I deposited in my bank the three checks totaling approximately $2200 that Defendant Guardian had issued as amounts due me for premiums I had paid during the premium waiver period of the policy.

2.

The earliest check for $409.50 issued on March 4th, 2005, a copy of which, along with its cover sheet, was attached to Plaintiff's original affidavit as Exhibit G, bounced: was not honored by Defendant's bank. I received a two-sided single page document from my bank apprising me of this fact on Monday July 21st, 2008. A two page copy of that document is attached to this affidavit as Exhibit A.

s/ Dwain Lee Kirkland

_____

By Dwain Lee Kirkland

7/25/2008

_____

Date

s/ Kimberly D. (indecipherable)

Notary Public

My Comm. Expires: My commission expires July 10, 2009

Affix notary seal here:

Notary Public, Madison County, Georgia
My Commission Expires July 10, 2009
(Stamped)

(2.)

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

7/25/2008

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

(3.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

DWAIN LEE KIRKLAND, Plaintiff	* *
vs.	*
	*Case Number *3:06-CV-107 (CDL)
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, Defendant	* * *

JUDGMENT

Pursuant to this Court's Orders dated May 5, 2008 and July 11, 2008, and for the reasons stated therein, JUDGMENT is hereby entered in favor of Defendant. Plaintiff shall recover nothing of Defendant. Defendant shall also recover costs of this action.

This 11th day of July, 2008.

Gregory J. Leonard, Clerk

s/ Gail G. Sellers
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

DWAIN LEE KIRKLAND, Plaintiff	* *
vs.	*
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, Defendant	*Case Number *3:06-CV-107 (CDL) *

ORDER

This case arises from Defendant The Guardian Life Insurance Company of America's denial of disability benefits to Plaintiff Dwain Lee Kirkland. On May 5, 2008, the Court entered an Order denying Plaintiff's Motion for Summary Judgment in its entirety and granting in part and denying in part Defendant's Motion for Summary Judgment. More specifically, the Court found that Defendant was entitled to summary judgment in its favor on each of Plaintiff's claims except one: whether Defendant refunded Plaintiff's premiums in accordance with the terms of the disability insurance policy at issue in this case. The Court's Order also permitted Defendant to supplement its Motion for Summary Judgment with evidence establishing that it properly refunded and/or waived Plaintiff's

premiums beginning on March 24, 2003. Both parties timely responded to the Court's Order.

The record now establishes that Defendant issued Plaintiff checks representing the premium refunds to which Plaintiff was entitled. *(See,* e.g., Exs. E-G to Br. Supp. Pl.'s Resp. to Def.'s

(1)

Supplement to Mot. for Summ. J.) Plaintiff has further acknowledged that "all premium amounts owed the Plaintiff appear to have been refunded at this time." (Pl.'s Aff. Para. 13, July 8, 2008.) Accordingly, Defendant's Motion for Summary Judgment (Doc. 27) is granted with respect to Plaintiff's claim that Defendant failed to refund Plaintiff's premiums in accordance with the policy terms.

The Court further notes that this Order, the Court's Order of May 5, 2008, and the Court's text-only order dated August 22, 2007 dispose of each of Plaintiff's claims asserted in this Court. The Clerk is therefore directed to enter a final judgment in favor of Defendant.

IT IS SO ORDERED, this 11th day of July, 2008.

S/Clay D. Land

CLAY D. LAND
UNITED STATES DISTRICT JUDGE

(2)

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charqes, download a copy of each document durinq this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply. '

U.S. District Court [LIVE AREA]
Georgia Middle District

Notice of Electronic Filing

The following transaction was entered on 6/5/2008 at 5:25 PM EDT and filed on 6/5/2008
Case Name: Kirkland v. The Guardian Life Insurance Company of America
Case Number: 3:06-cv-107
Filer:
Document Number: No document attached

Docket Text:
This is a text only entry; no document issued. ORDER denying [57] Motion for Reconsideration. Ordered by Judge Clay D. Land on 6/5/2008 (pgs)

3:06-cv-107 Notice has been electronically mailed to:

H. Sanders Carter, Jr sanders.carter@smithmoorelaw.com, donna.davis@smithmoorelaw.com

Lisa Renee Richardson lrichardson@mfllaw.com

Michael Patrick Johnson
michael.johnson@smithmoorelaw.com,
dawn.smith@smithmoorelaw.com

3:06-cv-107 On this date, a copy of this document, includinq any attachments filed with this document, has been mailed by United States Postal Service to any non CM/ECF participants in this case as indicated below::

Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

RECEIVED
CLERK'S OFFICE
08 MAY 22 - PM 3:02
U.S. DISTRICT COURT
MIDDLE DIST. OF GEORGIA
ATHENS, GEORGIA
(Stamped)

Dwain Lee Kirkland,)
Plaintiff)
v.)
)
The Guardian Life)
Insurance Company of)
America and Others,)
Defendants.)

Civil Action
Case No. 3:06-CV-107 (CDL)

PLAINTIFF'S MOTION FOR RECONSIDERATION

Comes now Plaintiff DWAIN LEE KIRKLAND and makes and files his Motion for Reconsideration. Pursuant to Local Rule 6.3(a)(1)The District Court's order granting partial summary judgment to the Defendants was filed and served via the U.S. Mail on Monday May 5th, 2008 making Plaintiff's Motion for Reconsideration with the ensuing weekends of May 10th & 17th and 3 days mailing due on Thursday May 22nd, 2008, 17 days hence the mailing of the order per the rule.

1.

Plaintiff filed a Demand for Jury Trial in the state court

before removal. Such demand is valid in the federal court after removal.

2.

The District Court has throughout this Motion for Summary Judgment and its May 5th, 2008 Order decided facts that are the sole province of a jury per The Constitution of the United States.

(1)

3.

Such trying of facts--the deciding of a fact, or even the deciding of the existence of a fact--are repugnant to the 5th, 7th and 14th Amendments to the Constitution of the United States.

WHEREFORE, Plaintiff objects to the trying of such facts by this Court on this Motion for Summary Judgment because such trying of facts is repugnant to the 5th, 7th and 14th Amendments to the Constitution of the United States, and respectfully prays that The Court try both the entirety of the facts and the law of this Motion for Summary Judgment, and the entirety of the motion itself, to a jury per the 7th Amendment to the Constitution of the United States.

That Plaintiff receive such other and further relief as may be due and granted under the rules of this court, the laws of the State of Georgia, and the laws of The United States of America.

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

5/22/2008

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

RECEIVED
CLERK'S OFFICE
08 MAY 22 - PM 3:03
U.S. DISTRICT COURT
MIDDLE DIST. OF GEORGIA
ATHENS, GEORGIA
(Stamped)

Dwain Lee Kirkland, Plaintiff	)	
v.	)	
	)	Civil Action
The Guardian Life Insurance Company of America and Others, Defendants.	)	Case No. 3:06-CV-107 (CDL)

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

Comes now Plaintiff DWAIN LEE KIRKLAND and makes and files his Brief in Support of his Motion for Reconsideration. Pursuant to Local Rule 6.3(a)(1)The District Court's order granting partial summary judgment to the Defendants was filed and served via the U.S. Mail on Monday May 5th, 2008 making Plaintiff's Motion for Reconsideration with the ensuing weekends of May 10th & 17th and 3 days mailing due on Thursday May 22nd, 2008, 17 days hence the mailing of the order per the rule.

PART 1: PRO SE PLEADINGS HELD TO LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED BY LAWYERS

"Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears [404 U.S. 519, 521] 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See Dioguardi v. Durning, 139 F.2d 774 (CA2

(1.)

1944)." ***HAINES v. KERNER, 404 U.S. 519, 520, 521 (92 SC 594, 30 LE2d 652) (1972).***

Common sense dictates that "less stringent standards" apply to all pleadings drafted by a Pro se litigant, especially those (affidavits, statements of fact, etc.) pursuant to a Pro se litigant defending himself against a motion for summary judgment. In *Haines* the Pro se litigant is defending himself against a motion to dismiss. Why should the same "less stringent standards" not apply to a Pro se litigant defending himself against a motion to for summary judgment? The outcome on both motions is the same: for want of social position and the money to buy a lawyer, a citizen of the United States does not get his day in court (in front of a jury).

For instance, in the case at bar, Plaintiff is disabled, could not afford a lawyer, could not afford to depose witnesses, let alone travel to Massachusetts and New York to depose them, and had his Interrogatories and Production of Documents disallowed by the District Court on the

specious argument advanced by the RICO defendants that said Discovery was filed on the last day of discovery. Now, given all of the above, Plaintiff who has an 11th grade education and has never had any formal training in the law outside a real estate course is supposed to plead Negligence, Fraud and Breech of Contract to a federal district court judge, with testimony and supporting documents, at the level of a $300 an hour trained and experienced lawyer in order to avoid summary judgment against him. The odds in this scenario are impossible to overcome even with a fair-minded judge, a commodity as scare, in the state of Georgia, as a seven pound gold nugget. The case at bar in at least some of its aspects is based on Circumstantial Evidence. And any case may be won based on a preponderance of Circumstantial Evidence. And likewise, summary judgment in any case may be avoided based on a scintilla of evidence of any kind. *See McCARTY v. NATIONAL LIFE & ACCIDENT INSURANCE COMPANY, 39629 (107 Ga. App. 178) (129 SE2d 408) (1962)* for a study regarding Circumstantial Evidence and

(2.)

Summary Judgment.

SUMMARY JUDGMENT TRIED TO A JUDGE IS REPUGNANT TO THE 5TH, 7TH AND 14TH AMENDMENTS

In the Superior Court of Athens-Clarke County, Plaintiff Dwain Lee Kirkland filed and subsequently served upon the defendants a Demand for Jury Trial. Per the Federal Rules of Civil Procedure, such a demand carries over to the federal district court upon removal. As such, Plaintiff is due a jury trial under the plain language of the 7th Amendment, of The Bill of Rights, of The United States Constitution: *In Suits at common law, where the value in*

controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Plaintiff, Dwain Lee Kirkland hereinafter objects to the judge of this court or any other court finding any fact, even the existence of a fact, as it is contrary to *"the right of trial by jury shall be preserved"* of the Seventh Amendment as quoted above.

The Founding Fathers preserved the right of Trial by Jury from the English common law for the following reasons: incompetence, bias, prejudice, bigotry and corruption. By seating a jury of 12 citizens to decide the outcome of any case at common law, the Founding Fathers understood that there would be 12 entirely separate chances to overcome incompetence, 12 entirely separate chances to overcome bias, 12 entirely separate chances to overcome prejudice, 12 entirely separate chances to overcome bigotry, and 12 entirely separate chances to overcome corruption. If the judge is allowed to decide a single fact, there are none.

The Founding Fathers realized that any single individual, no matter if he was a judge, could be incompetent, could be biased, could be prejudiced, could be a bigot, and certainly (they

(3.)

worried about this one most of all) could be corrupt.

Large sums of cash money directly deposited in unnumbered Swiss accounts make for a very unstable judiciary.

Likewise, no human being could go from a career of representing the worst society had to offer--the rapist, the murderer, the molester, the common and corporate thief--to have his bottom suddenly contact the bench and become a paragon of virtue.

Society at large accepts the fact that lawyers are inherently corruptible and inherently corrupt. And this is not a recent phenomenon. The Founding Fathers understood this to be so, and thus the 7th Amendment. The two techniques most often used by corrupt trial and appellate courts to throw an otherwise sound case are 1) to lie about the factual contents of the record and 2) to intentionally cite cases that are factually distinguishable from the case at bar. As can be easily seen, a jury as finder of fact forestalls both of these techniques. This is exactly what The Founding Fathers intended.

Further, to have any single individual, even a judge (oftentimes nothing more in reality than a politician with a law degree), decide any fact, or even the existence of a fact, is a Due Process violation of the 5th and 14th Amendments. The likelihood of incompetence, bias, prejudice, bigotry and corruption is so large and the likelihood of a fair hearing on any single fact so small, that there is no likelihood whatsoever that Due Process of Law (Due Process) under the 5th and 14th Amendments will ensue. For this reason too, Plaintiff, Dwain Lee Kirkland hereinafter objects to the judge of this court or any other court finding any fact, even the existence of a fact, as it is contrary to the Due Process clauses of the 5th and 14th Amendments.

In this regard, *see Gideon v. Wainwright, 372 U.S. 335 (1963)* where The Supreme Court of the United States held that the likelihood that criminal Defendant Gideon would receive a fair

hearing on the facts (a fair trial) whilst representing himself was so small that it affected (brought about) a denial of Due Process. Fact finding, as done only by a 12 man jury, is a procedural safeguard necessary for Due Process of Law.

Due to the foregoing, the only way for a trial and/or

appellate court to preserve the intent of the 5th, 7th and 14th Amendments on Motions to Dismiss, Motions for Judgment on the Pleadings, Motions for Summary Judgment, Motions for Directed Verdict and Motions Notwithstanding the Verdict is to try the first three motions to a grand jury; and then, according to the plain language of the *"no fact tried by a jury, shall be otherwise reexamined in any Court of the United States"* Seventh Amendment, allow the jury's determination on all five motions to stand regardless of the outcome. What greed has done to the Civil Process in the United States is one of the most shameful events in American history outside The Civil War and Roe v. Wade.

s/ Dwain Lee Kirkland

_____

Dwain Lee Kirkland, Pro se

5/22/2008

_____

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

(5.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

DWAIN LEE KIRKLAND, *
Plaintiff *
*
vs. *
*Case Number
*3:06-CV-107 (CDL)
*
THE GUARDIAN LIFE INSURANCE *
COMPANY OF AMERICA, *
Defendants *

ORDER

This case arises from Defendant The Guardian Life Insurance Company of America's denial of disability benefits to Plaintiff Dwain Lee Kirkland. Presently pending before the Court are Plaintiff's Motion for Summary Judgment (Doc. 31), Defendant's Motion for Summary Judgment (Doc. 27), and Plaintiff's Motion to Strike Defendant's Response and Enter Judgment in His Favor (Doc. 50). For the following reasons, the Court grants Defendant's Motion for Summary Judgment in part and denies it in part and denies Plaintiff's Motion for Summary Judgment and Motion to Strike.

BACKGROUND

I. The Policy

Plaintiff Dwain Lee Kirkland is a former computer

operator who currently resides in Georgia. Defendant The Guardian Life Insurance Company of America ("Guardian"), which maintains its home offices in New York, issued Plaintiff an individual disability income insurance

(1)

policy (the "Policy") with an effective date of April 12, 1984.[1] The Policy was delivered to Plaintiff in Florida, where he resided at the time, and it contains a number of contractual provisions that are at issue in this case. First, the Policy requires Plaintiff to provide Guardian with notice of a claim "within 30 days after any loss for which it is liable occurs or starts, or as soon after that as is reasonably possible." (Ex. 4 to Pl.'s Dep. 15.)[2] Second, the Policy provides that

> [w]ritten proof of loss must be given Guardian at its home office or any agency office :
> . for loss from disability within 90 days after the end of the period for which Guardian is liable;
> . and for any other loss within 90 days of the date of loss.
> If proof is not given within such time, claim will not be denied or reduced if :
> . it was not reasonably possible to give proof within such time; and
> . proof is given to Guardian as soon as possible.
> In no case will Guardian pay benefits if the delay in furnishing proof of loss is more than a year, unless the insured has lacked legal capacity.

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[1]The caption indicates that Plaintiff is suing "The Guardian Life Insurance Company of America and others." However, Plaintiff has never specifically identified who

these others" might be, other than saying that "Berkshire might be a possibility." (Pl.'s Dep. 176:19, Apr. 23, 2007.) Berkshire Life Insurance Company "is a wholly-owned subsidiary of The Guardian Life Insurance Company of America . . . . Berkshire Life administers claims under individual disability insurance policies issued by The Guardian." (Faniel Aff. Para. 2, July 27, 2007 [hereinafter Faniel Aff. I].) The Court therefore concludes that Plaintiff is suing only Guardian and will refer to the Defendant as "Guardian" throughout the Order for the sake of clarity.

[2]Portions of the copy of the Policy filed on CM/ECF are illegible. (See Attach. 2 to Doc. 27.) In addition, many of the pages of the Policy are unnumbered. Therefore, the Court will refer to the copy of the Policy attached as Exhibit 4 to Plaintiff's deposition and will refer to the pages of the Policy in sequential order.

(Id.) Third, the Policy provides that "Guardian will not pay benefits under this policy for any period of disability during which the insured is not under the care of a physician" and defines "physician" as "a legally qualified physician other than the insured or [policy] owner." (*Id.* at 6.) Fourth, the Policy refers to "residual disability" coverage by which partial benefits could be paid when the insured is able to work, but "solely because of disability from sickness or injury, is unable to earn at a rate of at least 80% of his prior monthly earned income." (*Id.* at 5.) Finally, the Policy provides for cost-of-living adjustments and waiver of premium benefits when the insured has been found to be disabled. (*Id.* at 9, 18.)

II. Plaintiff's Claim for Disability Benefits

In February of 2003, Plaintiff first notified Guardian that he had become totally disabled and specified the date his disability began as February 1, 1993. Berkshire Life

Insurance Company ("Berkshire") sent Plaintiff the required claim forms on behalf of Guardian; these forms constituted the "proof of loss" required under the Policy. After receiving repeated reminders from Berkshire, Plaintiff finally submitted the completed claim forms dated March 21, 2003 and August 28, 2003. Plaintiff specified that he had become disabled at 12:00 a.m. on February 1, 1993 due to "radiation/heavy metal/chemical poisoning," although the symptoms of this disabling condition had begun at "birth." (Ex. 4 to Def.'s Mot. for Summ. J. 2.) Plaintiff stated that he "was unable to work in any occupation

(3)

at all due to reaction to, and prevalence of, electromagnetic fields and radiation." *(Id.)* The forms also required Plaintiff to identify each physician from whom he sought treatment for his disability. Plaintiff identified his current provider as Paul V. Wickster, a chiropractor. In the Attending Physician Statement included with Plaintiff's claim form, Dr. Wickster reported that Plaintiff's "flu-like symptoms, malaise, [and] confusion" first appeared in 1962. *(Id.* at 6.) The statement also indicated that Plaintiff first sought treatment from Dr. Wickster on April 2, 2003, shortly after Plaintiff submitted his notice of claim. *(Id.)*

Plaintiff also indicated that from 1992 until April 2003, he was seen and treated for his disability by: (1) Around the Clock Medical in 1992 for unresolved prostatitis; (2) Dr. Paul Jacobsen in 1992 for wrist pain and ganglion cysts; (3) Dr. Richard Greene in August of 1998 for urethral itching; (4) Elaine Chan, an acupuncturist, in September of 1999 for impotence and lethargy; (5) San Souci Acupuncture in November of 1999 for impotence and lethargy; (6) an unspecified general practitioner in 2000 for depression, impotence, and lethargy; (7) Aventura Hospital in December of 2000

for right groin pain; (8) Holistic Massage and Wellness Center in April of 2001 for sore bowel; (9) Planned Parenthood in October of 2001 for a urinary tract infection; (10) Massage by Meadow in August of 2002 for trigger point therapy; and (11) Dr. James Haymore in February of 2003, who found "insufficient certainty of fibromyalgia diagnosis to

(4)

institute treatment or referral." *(Id.* at 9-16.) Plaintiff also listed a number of medical providers he had seen prior to his alleged period of disability, dating as far back as 1962.

III. Claims Evaluation Process

Berkshire struggled for the next nineteen months to evaluate the merits of Plaintiff's disability claim. (Faniel Aff. I para. 13.) Berkshire initially focused on securing information relating to Plaintiff's disability for "the period immediately before and since March 2003, when [Plaintiff] first notified The Guardian that he claimed to have been disabled." (Faniel Aff. Para. 5, Sep. 14, 2007 [hereinafter, Faniel Aff. II].) To this end, Berkshire sought records from Dr. Wickster and requested that Plaintiff provide his occupational information for the previous five years. Berkshire received no response from Plaintiff until January of 2004, and the response consisted of a list of medical providers similar to that submitted by Plaintiff in August of 2003. Plaintiff's response failed to provide his occupational information.[3] Despite lacking this information, Berkshire's representative visited Plaintiff on February 19, 2004 and paid Plaintiff benefits under a reservation of rights. The payment represented the benefits to which Plaintiff would be entitled from March 24, 2003 through January 24, 2004. Plaintiff returned the check without cashing it because he believed he was

[3]The record indicates that Plaintiff was represented by an attorney at least from early October of 2003 through December 5th, 2003. (Exs. C, D, & F to Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. [hereinafter, Def.'s Resp.].)

entitled to a substantially higher payment under the terms of the Policy.[4]

On March 18, 2004, Dr. Wickster completed a Progress Report regarding Plaintiff's disability and indicated that Plaintiff was not totally disabled.[5] *See* Ex. L to Def.'s Resp.) Dr. Wickster also informed Berkshire that "neither he nor his staff had completed parts of the original Attending Physician Statement submitted with [Plaintiff's] claim, including Mr. Kirkland's date of first symptoms, height and weight, hospitalization dates and locations, dates of disability, restrictions and limitations, and objective and subjective findings." (Faniel Aff. II Para. 16.) Shortly thereafter, Berkshire informed Plaintiff that his file would be closed because "based upon the information presently available, there is not sufficient proof to document a covered loss under the terms of your policy. " (Ex. J to Def.' s Resp.) More specifically, Berkshire indicated that Plaintiff had failed to provide either a "certification of disability from a physician with accompanying restrictions or limitations" or "a completed employer's questionnaire that would describe the duties of your occupation." *(Id.)* Berkshire

[4]Guardian admits that the payment was, in fact, incorrect and should have been in the amount of $9,720.00 instead of $1,630.00. The company inadvertently omitted a $900 per month social insurance substitute and paid Plaintiff only his $180 per month disability benefit. (See Ex. 14 to Def.'s

Mot. for Summ. J. 4.) Plaintiff, however, believed he was entitled to approximately $121,000 in full payment for the ten-year period preceding his notice of claim. (Ex. 11 to Pl.'s Mot. for Summ. J. 3.)

[5]Dr. Wickster submitted another progress report in June of 2004, again attesting that Plaintiff was not totally disabled.

also expressed concern that Dr. Wickster indicated that he did not fill out portions of the Attending Physician Statement. *(Id.)*

In response, Plaintiff contacted Berkshire in May of 2004 to inform them that he would attempt to provide the requisite information to substantiate his claim. In September of 2004, a Berkshire representative contacted Plaintiff to explain that although his Policy referred to residual disability, Plaintiff had paid no premiums for residual disability benefits. Thus, because Dr. Wickster had again certified that Plaintiff was not totally disabled, the documentation available to Berkshire indicated that Plaintiff was not entitled to benefits under the Policy. (Ex. L to Def.'s Resp.) Berkshire also informed Plaintiff that his delay in notifying the company of his claim "severely prejudiced" its ability to evaluate Plaintiff's claim and that Plaintiff had "indicated to [Berkshire] both verbally and in [his] correspondence that there were significant periods of time since 1993 that [he was] not under the care of any physician." (Id.)

In October and November of 2004, Plaintiff withdrew his authorization for Berkshire to obtain his medical records because Berkshire was allegedly harassing him and his health care providers; he also voiced these concerns in correspondence to Berkshire and Guardian representatives. In the meantime, however, Plaintiff began

receiving treatment from Dr. Richard Born, a psychologist. Dr. Born diagnosed Plaintiff as suffering from several psychological conditions, including Posttraumatic Stress Disorder. "Based on an

Attending Physician's Statement received from Dr. Born. dated November 22, 2004, and records ultimately obtained from Dr. Born, [Plaintiff's] claim was accepted and benefits were paid effective March 2003. Those benefit payments have continued to the present." (Faniel Aff. II Para. 21.)

IV. Final Denial of Plaintiff's 1993-2003 Claims

In December of 2005, Plaintiff requested that Berkshire review his entire medical history in order to gain a better understanding of his current, accepted disability and its origins. Berkshire agreed to attempt to contact the providers listed in Plaintiff's original notice of claim and proof of loss, contingent upon Plaintiff signing another authorization to obtain his medical records. Plaintiff drafted his own authorization and returned it to Berkshire on May 27, 2005. Berkshire was ultimately able to secure medical records from Dr. Jacobsen, Ms. Chan, and Aventura Hospital. (Faniel Aff. I Para. 15; Exs. 10, 11, 12, 13 to Def.'s Mot. for Summ. J.) These records indicated that Dr. Jacobsen had seen Plaintiff seven times from 1993 until 2000 for prostatitis, ganglion cysts, an eye infection, a lesion in his mouth, and a cat bite. Ms. Chan saw Plaintiff six times in July and August of 1999 for sore leg muscles, decreased sexual function, and stomach discomfort. Aventura Hospital treated Plaintiff on December 29, 2000 for right groin pain. Berkshire was informed by Around the Clock Medical, Dr. Greene, Holistic Massage and Wellness Center, Planned Parenthood, and Massage by Meadow that they had no records of Plaintiff's treatment.

Berkshire forwarded these records to an independent consulting psychologist who concluded that the records contained "no documentation of psychological symptomatology or functioning" or "any indication of impairment resulting from psychological or cognitive symptoms prior to [Plaintiff's] meeting with Dr. Richard Born in June 2004." (Ex. 26 to Pl.'s Mot. for Summ. J.) In addition, Berkshire forwarded the non-psychiatric medical records it was able to obtain to an independent consulting physician who likewise concluded that "prior to March 24, 2003, the medical evidence does not support a finding of any non-psychiatric condition that would cause impairment." *(Id.)* Moreover, the consulting physician "found that the evidence does not support impairment, restrictions or limitations on the basis of any non-psychiatric diagnosis." *(Id.)* Plaintiff's claim for benefits prior to March 24, 2003 was ultimately denied as of October 2006. *(Id.)*

For purposes of the pending motions, Guardian contends that it is entitled to summary judgment in its favor because Plaintiff failed to meet three of the Policy's conditions precedent to payment of the claim: (1) Plaintiff failed to provide a notice of claim within thirty days of the date his disability began; (2) Plaintiff failed to provide timely proof of loss in accordance with the Policy; and (3) Plaintiff failed to demonstrate that he was under the care of a physician at the time of his disability. [6] Conversely, Plaintiff

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[6]For purposes of the pending motions, Guardian does not appear to contend that Plaintiff was not disabled; rather, it bases its motion for summary judgment on the fact that Plaintiff failed to comply with the

contends that he is entitled to summary judgment because he has been disabled since February 1, 1993 and has met all the conditions precedent to the payment of his claim. Plaintiff also argues that Guardian's response to his motion for summary judgment was untimely and should be stricken.

DISCUSSION

I. Motion to Strike

The first motion pending before the Court is Plaintiff's Motion to Strike Defendant's Response and Enter Judgment in His Favor. Plaintiff contends that he filed for summary judgment on July 30, 2007, and thus Guardian's Response should have been due on August 20, 2007 per Local Rule of Civil Procedure 7.2, which provides respondent with "twenty (20) days after service of movant's motion and brief" to submit its response brief. Plaintiff correctly notes that Guardian failed to respond prior to this date; consequently, Plaintiff argues, Guardian's 'statement shall be deemed to have been admitted' and summary judgment must be entered in Plaintiff's favor." (Pl.'s Mot. to Strike Def.'s Resp. and Enter J. in His Favor Para. 5.) Plaintiff's argument lacks merit, however, because given the procedural posture of this case, Guardian's response was timely.

The Court initially ordered the parties to submit their dispositive motions by July 31, 2007. While it is true that Plaintiff filed his motion for summary judgment on July 30, 2007,

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foregoing conditions. Thus, the Court's Order should not be construed as expressing an opinion as to whether Plaintiff was, in fact, disabled prior to March 24, 2003.

(10)

Plaintiff failed to file an accompanying "memorandum of law citing supporting authorities," as expressly required by Local Rule of Civil Procedure 7. Plaintiff then requested an extension of time to allow him to file this accompanying brief. On August 2, 2007, the Court granted Plaintiff's motion. On August 13, 2007, Plaintiff timely filed his memorandum in support of his motion and his statement of undisputed material facts.

The briefing schedule was necessarily altered by the fact that Plaintiff filed his brief on August 13th. See Local R. Civ. P. 7.2 (requiring response to be filed "within twenty (20) days after service of movant's motion and brief" (emphasis added)). Because of this alteration, Guardian's brief was due on September 5, 2007, twenty-three days after service of Plaintiff's brief. See Local R. Civ. P. 6.3(a)(2) (providing three day extension to ordinary briefing schedule when service is effected by mail). However, the briefing schedule was again altered on August 31, 2007, when Guardian requested an extension to file its response. This extension was also permissible. Local Rule 6.2 permits the clerk of court and his deputies "to permit extensions of time to a date certain not to exceed fourteen (14) days for the filing of briefs." Because the deputy clerk granted Guardian's request for an extension, Guardian's response to Plaintiff's motion for summary judgment was due on September 14, 2007. Guardian filed its response and statement of disputed material facts on that day. Guardian's response was therefore timely, and the Court denies Plaintiff's Motion to Strike.

(11)

II. Motions for Summary Judgment

A. Summary Judgment Standard

Summary judgment is proper where "the pleadings,

the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party has the burden of showing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). This burden can be met by showing that the non-moving party will be unable to "establish the existence of an element essential to [the non-moving party's] case, and on which [the non-moving party] will bear the burden of proof at trial." *Id.* at 322.

Once the moving party has met its burden, the burden shifts to the non-moving party to show that there is a genuine issue of material fact. *Id.* at 324. A fact is material if it "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). There is a genuine issue if the evidence would allow a reasonable jury to find for the non-moving party. *Id.* In other words, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

In determining if the parties have met their respective burdens, the Court resolves "all reasonable doubts about the facts in favor of the non-movant, and draw[s] all justifiable inferences in his

favor." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115 (11th Cir. 1993) (internal quotation marks and citation omitted). Additionally, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. " *Augusta Iron & Steel Works, Inc. v. Employers Ins. of Wausau,* 835 F.2d 855, 856 (11th Cir. 1988) (internal quotation marks and citation omitted).

In order to resolve this case on summary judgment, the Court must first determine which state's substantive law applies to each of Plaintiff's claims. Generally, "[a] federal court sitting in diversity will apply the conflict-of-laws rule of the forum state." *Grupo Televisa, S.A. v. Telemundo Commc'ns Group, Inc.,* 485 F.3d 1233, 1240 (11th Cir. 2007). A court must characterize each legal issue in question and then "determine[ ] the choice of law rule that the forum state applies to that particular type of issue." *Id.* Georgia follows "[t]he traditional method of resolving choice-of-law issues," using "a tripartite set of rules, which are lex loci contractus, lex loci delicti, and lex fori." *Brinson v. Martin,* 220 Ga. App. 638, 638, 469 S.E.2d 537, 538 (1996) (internal quotation marks and citation omitted) .

In this diversity case, Plaintiff alleges three distinct theories of recovery: negligence, fraud, and breach of contract.[7]

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[7]Plaintiff also contends "[t]hat the Defendants repeatedly engaged in interpretation of the Contract - a legal contract, in apparent violation of Georgia Law - in their letters to the Plaintiff." (Compl. Para. 35.) To the extent that this can be construed as a claim for the unauthorized practice

Plaintiff also seeks attorney fees and a "25% Penalty on all amounts due the Plaintiff per State law." (Compl. Para. 43.) Because this Court sits in Georgia, the Court will apply Georgia's tripartite set of conflict of law rules to determine which state's substantive law applies to each claim. The Court will then determine whether, under that state's law, summary judgment is appropriate.

B. Plaintiff's Torts Claims

First, Plaintiff alleges tort claims for negligence and fraud. The Georgia Supreme Court recently reaffirmed that the traditional rule of *lex loci delicti* governs choice of law issues for tort actions brought in Georgia courts. *Dowis v. Mud Slingers, Inc.,* 279 Ga. 808, 816 , 621 S. E . 2 d 413, 419 (2005) . "Under this traditional rule, a tort action is governed by the substantive law of the state where the tort was committed. " *Id.* at 809, 621 S.E.2d 414. Plaintiff has not clearly described where each allegedly fraudulent or negligent act actually took place. However, Plaintiff's claims

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of Georgia law, the claim lacks, merit. "Georgia law does not recognize a private right of action for the alleged unauthorized practice of law." *Oswell v. Nixon,* 275 Ga. App. 205, 207, 620 S.E.2d 419, 421-22 (2005) (noting that "the remedies for the unauthorized practice of law include criminal sanctions and allowing the state bar and certain bar organizations to pursue injunctive relief").

Additionally, in a text-only order dated August 22, 2007, the Court denied Plaintiff's Motion to Amend the Pleadings to include various additional claims. Thus, the Court will not address the claims raised in Plaintiff's Amended Complaint, which appear to include the substantive offenses and conspiracy to commit: (1) theft by taking in violation of Georgia law; (2) theft by deception in violation of Georgia law; (3) mail fraud in violation of federal law; (4) wire fraud in violation of federal law; and (5) Georgia RICO claims.

are without merit regardless of whether they occurred in Georgia, Florida, Massachusetts, or New York.[8]

1. Negligence

Plaintiff's negligence claim is based upon Guardian's failure to obtain his medical records before their destruction. Plaintiff contends that for two years, Guardian negligently delayed seeking records from the medical providers listed in his August 2003 proof of loss. This delay caused " [a]t least four sets of Plaintiff/affiant medical records [to be] subsequently irretrievable due to having been destroyed. These records could have substantiated Plaintiff/affiant's claim." (Pl.'s Br. Containing Argument & Citations of Authority in Supp. of Pl.'s Mot. Summ. J. 5.)

Even assuming Plaintiff can properly bring a tort claim for the allegedly negligent performance of a contractual duty and that Guardian acted negligently, no reasonable jury could conclude that Guardian's failure to request Plaintiff's records was the proximate cause of their destruction and the subsequent harm to Plaintiff. *See, e.g., Guida v. Lesser,* 264 Ga. App. 293, 297, 590 S.E.2d 140, 144 (2003) ("Proximate cause means that which, in the natural and continuous sequence, unbroken by other causes, produces an event, and without which the event would not have occurred." (internal quotation

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[8]From Plaintiff's submissions to the Court, it appears that any allegedly tortious conduct must have occurred in one of these states. Plaintiff has resided in either Georgia or Florida at all times relevant to this litigation; Berkshire's offices and its representatives are located in Massachusetts; and Guardian's offices are in New York.

marks and citation omitted)); *accord Sardell v. Malanio,* 202 So.2d 746, 747 (Fla. 1967); *Wallace v. Ludwig,* 198 N.E. 159, 161 (Mass. 1935); *Hoggard v. Otis Elevator Co.,* 276 N.Y.S.2d 681, 686 (N.Y. Sup. Ct. 1966). Plaintiff

acknowledged in his deposition that he does not know whether his medical records were destroyed before or after he submitted his claim to Guardian in 2003. (Pl. 's Dep. 75: 20 -76: 8; 79:7-25; 82:7-24; 201:25-202:16.) Plaintiff further testified that he destroyed some of his records himself. (Pl.'s Dep. 81:8-14.) The record therefore contains insufficient evidence to create a genuine issue of material fact as to whether Guardian's alleged delay proximately caused the destruction of the records. Guardian is therefore entitled to summary judgment on Plaintiff's negligence claims.

2. Fraud

Plaintiff also claims that Guardian committed fraud (1) by accepting Plaintiff's premium payments without intending to pay the benefits and (2) by purposely failing to request Plaintiff's medical records in a timely fashion. Again assuming that this claim is properly brought as a tort action, Plaintiff has directed the Court to no evidence that Guardian made any false representation on which Plaintiff detrimentally relied.[9] *See, e.g., Lusins v. Cohen,* 853

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[9]Plaintiff apparently bases this claim on the continued communication between himself and Berkshire, contending that Guardian was merely "stringing the Plaintiff along by promising a resolution based on Plaintiff supplying them with more information on his medical treatment" with the goal of "keep[ing] the Plaintiff involved in the claim process in such a way that he would not file suit for breech [sic] of contract

N.Y.S.2d 685, 687 (N.Y. App. Div. 3d Dep't 2008) (in order

to state a claim for fraud, "a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury") (internal quotation marks and citation omitted)); *Tankersley v. Barker,* 286 Ga. App. 788, 789 n.1, 651 S.E.2d 435, 437 n.1 (2007) ("The elements of fraud are: false representation by the defendant, scienter, intent to induce the plaintiff to act or refrain from acting, plaintiff's justifiable reliance on the false representation and damages to the plaintiff."); *Chan v. Chen,* 872 N.E.2d 1153, 1157 (Mass. App. Ct. 2007) ("To prevail on a claim for fraud or deceit, a plaintiff must prove as an essential element of the claim that the defendant has knowingly made a false statement of material fact, intending that the plaintiff rely thereon, and upon which the plaintiff did rely."); *Lopez-Infante v. Union Cent. Life Ins. Co.,* 809 So. 2d 13, 15 (Fla. Dist. Ct. App. 2d 2002) ("The essential elements of a fraud claim are: (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation

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till after the statute of limitations had expired." (Pl.'s Mot. for Summ. J. Para. 3.) This contention is unsubstantiated in the record. Plaintiff was made aware that there were potential problems with the timeliness of his claim from the outset of the claims resolution process. *(See, e.g.,* Ex. 4 to Pl.'s Mot. for Summ. J. (notifying Plaintiff on August 22, 2003 that "there are provisions in your policy that pertain to the timeliness of filing a claim. While we are clearly outside of these parameters, we are unsure what effect, if any, that this may have on your claim."); Ex. 2 to Pl.'s Mot. for Summ. J. (informing Plaintiff of time constraints on May 13, 2003).)

induces another's reliance; and (4) consequent injury by the other party acting in reliance on the representation."). Therefore, under the laws of Georgia, Florida, Massachusetts, and New York, Guardian is entitled to summary judgment on Plaintiff's fraud claims.

C. Plaintiff's Breach of Contract Claims

1. *Choice of Law*

Plaintiff also alleges claims for breach of contract. Georgia has adopted the general rule that where a contract contains no choice of law or jurisdiction provision, the location where the contract was executed determines the applicable law under the principle of *lex loci contractus. Gen. Tel. Co. of Se. v. Trimm,* 252 Ga. 95, 95, 311 S.E.2d 460, 461 (1984). Where the contract contemplates execution in another jurisdiction, however, that state's law will apply. *Id.* To determine where the contract was executed, a "court must determine where the last act essential to the completion of the contract was done." *Id.* "With regard to insurance contracts, Georgia law provides that the last act essential to the completion of the contract is delivery; consequently, insurance contracts are considered made at the place where the contract is delivered." *Johnson v. Occidental Fire & Cas. Co. of N.C.,* 954 F.2d 1581, 1584 (11th Cir. 1992).

Based upon these legal principles, Guardian contends that the Court must apply Florida law to resolve the breach of contract claims in this case because the Policy was delivered in Florida. Plaintiff,

however, urges the Court to rely on an exception to the *lex loci contractus* rule that provides that "where a state has no substantial relationship to the parties or the transaction, or the result obtained from the applicability of

the law of the chosen state would be contrary to Georgia's public policy," then "Georgia's conflict of law rules mandate the application of Georgia law." *Id.* (internal quotation marks and citation omitted). Plaintiff contends that because he moved from Florida to Georgia in 2002, a "substantial relationship" between the parties and Florida no longer exists, and therefore Georgia law should apply.

The Court finds that Florida law applies to this case. First, Plaintiff has not demonstrated that an application of Florida law would contravene Georgia public policy, and it appears that Georgia and Florida law are similar with respect to the claims at issue here. (*See* Def.'s Resp. 13-16 (analyzing both Georgia and Florida substantive law).) In addition, the Court finds that there is a substantial relationship between Florida, the parties, and the disputed insurance Policy. Not only was the Policy delivered in Florida, but Plaintiff lived in Florida and sought medical treatment there for the majority of the period for which he claims benefits should have been paid. Furthermore, the contract contains a Florida statutory rider that ensures the contract complies with Florida law. (Ex. 4 to Pl.'s Dep. 11.) Accordingly, the Court will apply Florida law to resolve Plaintiff's breach of contract claims.

2. Disability Claims from February 1, 1993 to March 24, 2003

Plaintiff claims that he is entitled to summary judgment because Guardian breached its contractual duty to provide him with disability benefits from February 1, 1993 to March 24, 2003. Guardian contends that it is entitled to summary judgment because Plaintiff failed to fulfill the Policy's conditions precedent to its duty to pay him benefits. Thus, summary judgment in either party's favor would not be warranted if, under Florida law,

genuine issues of material fact exist as to whether either party failed to comply with its contractual duties.

i. MEDICAL CARE REQUIREMENT

Guardian first submits that it is not liable for benefits because Plaintiff failed to meet the Policy's medical care requirement. Guardian emphasizes that Plaintiff admitted that he did not have regularly-scheduled appointments with his medical care providers, (Pl.'s Dep. 151:3-13), and that "[t]he policy provides that no benefits will be paid 'for any period during which the insured is not under the regular care of a physician.'" (Def.'s Mem. in Supp. Mot. for Summ. J. 16 (emphasis added).)

However, the Policy actually reads: "Guardian will not pay benefits under this policy for any period of disability during which the insured is not under the care of a physician." (Ex. 4 to Pl .' s Dep. 6.) Under Florida law, such "care and attendance" clauses are construed liberally in favor of coverage. *See, e.g., Fritz v.*

Standard Sec. Life Ins. Co. of N.Y., 676 F.2d 1356, 1358 (11th cir. 1982) (applying Florida law); *see also Mutual Ben. Health & Accident Ass'n v. Bunting,* 183 So. 321, 327 (Fla. 1938) (observing that even very strict care and attendance provisions "merely require [ ] substantial compliance" with the terms of the policy). The plain language of the Policy does not require Plaintiff to maintain regularly-scheduled appointments with his doctors. Moreover, the plain language of the medical care requirement does not necessarily require that the physician's care relate directly to the alleged disability. Here, Plaintiff has shown that although he may not have had regular appointments with his doctors, he was being treated by a physician during at least some of the period

for which he is claiming benefits. (*See* Exs. 10 & 12 to Def.'s Mot. for Summ. J.) The Court therefore concludes that, at least for the period where Plaintiff has shown he was being treated by a physician, genuine issues of material fact exist, precluding the grant of summary judgment in Guardian's favor on this basis.[10]

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[10]The Court further finds that genuine issues of fact remain as to when Plaintiff was actually under the care of a physician and whether he actually complied with the plain language of the medical care provision. The record indicates that there were some periods during which Plaintiff was receiving no medical care whatsoever. (See Ex. L to Def.'s Resp.) The record is also unclear as to whether Plaintiff received his care from a "physician" as required by the Policy. Plaintiff apparently undertook "approximately 1100 hours of self-administered trigger point therapy, reflexology and cranial sacral massage" and "also developed a technique for clearing and scanning allergies." (Ex. 4 to Def.'s Mot. for Summ. J. 16.) Under the plain language of the Policy, self-treatment does not meet the medical care requirement. *See, e.g., Mack v. Unum Life Ins. Co. of Am.*, 471 F. Supp. 2d 1285, 1290 (S.D. Fla. 2007) (applying Florida law and finding plaintiff's self-treatment of diabetes did not meet medical care

ii. NOTICE REQUIREMENTS

Guardian next claims that summary judgment is appropriate because Plaintiff failed to provide timely notice of his claim and/or timely proof of loss in accordance with the Policy. Guardian also contends that this failure prejudiced its ability to contemporaneously evaluate Plaintiff's disability claim. Because no reasonable jury could find that Plaintiff complied with these provisions in a

timely manner, summary judgment in favor of Guardian is granted to the extent that Plaintiff asserts he is entitled to disability benefits from February 1, 1993 until March 23, 2003.

a. Compliance with Specified Time Limits

The Court first finds that Plaintiff did not provide his notice of claim or proof of loss within the time limits specified by the Policy. Florida law recognizes that an insurer may be relieved from its liability for benefits when the insured has failed to comply with an insurance policy's notice provisions. *See, e.g., Am. Fire & Cas. Co. v. Collura,* 163 So.2d 784, 790-91 (Fla. Dist. Ct. App. 1964) ("[W]here the policy contains a clause requiring that notice of an accident be given 'as soon as practicable' in the absence of

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provision requiring "that he obtain appropriate medical care from someone other than himself"). In addition, much of Plaintiff's care was obtained from alternative medical practitioners, such as acupuncturists and massage therapists. It is unclear whether this alternative care would also be considered to determine whether Plaintiff met the medical care requirement. However, the Court need not resolve these issues because the Court finds that genuine issues of material fact exist as to whether Plaintiff complied with one of the conditions precedent to the recovery of his benefits, Plaintiff's motion for summary judgment must be denied.

a valid excuse for the delay, [a breach of that clause] relieves the company of the obligation to defend the insured."); *see also Morton v. Indem. Ins. Co. of N. Am.,* 137 So.2d 618, 620 (Fla. Dist. Ct. App. 1962), *overruled on other grounds by Collura,* 163 So.2d at 793-94 (finding that

the failure to give notice for more than six months was a breach of the policy that relieved the insurer of liability for benefits).

In this case, the Policy requires that "[n]otice of claim must be given Guardian within 30 days after any loss for which it is liable occurs or starts, or as soon after that as is reasonably possible." (Ex. 4 to Pl.'s Dep. 15.) Plaintiff's Notice of Claim was dated March 25, 2003 and specified his disability as "toxicity symptoms, unknown origin" that began on February 1, 1993. (Ex. 3 to Def.'s Mot. for Summ. J.) At the earliest, Plaintiff alerted Guardian to his potential disability in February of 2003. (Pl.'s Dep. 76:22, 77:9-12.) It is therefore clear, and the parties do not dispute, that Plaintiff filed his notice of claim more than thirty days after the date he became disabled.

Likewise, Plaintiff failed to file his proof of loss within the time limit specified by the Policy. The Policy requires the insured to provide such proof "within 90 days after the end of the period for which Guardian is liable." (Ex. 4 to Pl.' s Dep. 15.) Guardian claims that " '[t]he period for which Guardian is liable' is in increments of one month." (Def.'s Mem. in Supp. Mot. for Summ. J. 13 n.3.) In support of this construction, Guardian points out that

the Policy provides that "all accrued benefits for disability" will be paid monthly. *(Id.* at 12.) According to Guardian, Plaintiff's written proof of loss for a disability that began on February 1, 1993 would have been due no later than July 1, 1993.[11]

Plaintiff, however, argues that "[t]he word 'period' is used multiple times in the language of the policy to define varying lengths of time." (Pl.'s Resp. to Def.'s Mot. for

Summ. J. 18 [hereinafter Pl.' s Resp.].) For example, Plaintiff points to the schedule page of his Policy, which "states that the maximum benefit period is 'to 65, but not less than 2 years.'" *(Id.)* Accordingly, Plaintiff argues that "the period for which Guardian is liable" "can obviously be 36 years" and that he provided proof of loss well within this thirty-six year period. *(Id.)*

"The interpretation of an insurance contract is a question of law[.]" *Kattoum v. N.H. Indem. Co.,* 968 So.2d 602, 604 (Fla. Dist. Ct. App. 2007). Any ambiguous provisions in an insurance contract must be "interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Transcon. Ins. Co. v.*

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[11]Guardian explains this calculation as follows:

> If plaintiff's disability had begun on February 1, 1993, as now alleged, benefits first would have been payable for the month beginning March 3, 1993, the end of the 30-day elimination period. The end of the first "period for which Guardian is liable" would have been April 2, 1993. Ninety days from that date was July I, 1993, which is the date when proof of loss was first due.

(Def.'s Mem. in Supp. Mot. Summ. J. 13.)

Jim Black & Assocs., Inc., 888 So.2d 671, 675 (Fla. Dist. Ct. App. 2004) (internal quotation marks and citation omitted). The terms should be "interpreted in a reasonable manner, consistent with the objectives and intentions of the contracting parties, i. e., to provide disability benefits in the event [Plaintiff] established that he had become physically disabled during the term of the policy." *McPhee v. The Paul Revere Life Ins. Co.,* 883 So.2d 364, 368 (Fla.

Dist. Ct. App. 2004).

The Court concludes that Plaintiff's interpretation of the Policy is unreasonable as a matter of law. "[T]he purpose of a provision for notice and proofs of loss is to enable the insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it." *Laster v. U.S. Fid. & Guar. Co.,* 293 So.2d 83, 86 (Fla. Dist. Ct. App. 1974) (internal quotation marks and citation omitted). Under Plaintiff's interpretation of the Policy, Guardian would be prevented, perhaps for decades, from evaluating claims for which it might be liable. This construction is neither consistent with the purpose of a proof of loss provision nor "with the objectives and intentions of the contracting parties." *McPhee,* 883 So.2d at 368.

The Policy plainly provides that Guardian will pay any benefits for which it is liable monthly. (Ex. 4 to Pl.'s Dep. 4.) Thus the most reasonable construction of the contract is that "the period for which Guardian is liable" occurs on a monthly basis. In order for

Plaintiff's proof of loss to be timely for a disability date of February 1, 1993, Plaintiff should have filed his proof of loss by July 1, 1993. Based on the foregoing, it is clear that Plaintiff failed to file both his notice of claim and proof of loss within the times specified by the Policy.

b. Notice Filed within Reasonable Time

Despite this delayed notice, however, Plaintiff could still demonstrate compliance with the terms of the Policy by establishing (1) that he notified Guardian of his claim for disability benefits as soon as was reasonably possible and (2) that it was not reasonably possible for him to submit his proof of loss within ninety days after the end of the period for which Guardian is liable. (Ex. 4 to Pl.'s Dep.

15.) Whether the insured has complied with a policy provision containing language such as that requiring notice of loss to be provided "'as soon as practicable' . . . has been construed to mean that notice is to be given with reasonable dispatch and within a reasonable time in view of all the facts and circumstances of the particular case." *State Farm Mut. Auto. Ins. Co. v. Ranson,* 121 So.2d 175, 181 (Fla. Dist. Ct. App. 1960), *overruled on other grounds by Collura,* 163 So.2d at 793-94. "Florida courts have uniformly held that the determination of what is a reasonable time depends on the circumstances and is ordinarily a question of fact for the jury or fact-finder." *Sims v. Am. Hardware Mut. Ins. Co.,* 429 So.2d 21, 22 (Fla. Dist. Ct. App. 1982). However, when the surrounding facts and

circumstances "are undisputed and different inferences cannot reasonably be drawn therefrom, the question is for the court." *Ranson,* 121 So.2d at 182.

Plaintiff justifies his delayed notice by arguing that he "could not possibly have notified Guardian concerning his Electrical Sensitivity and Multiple Chemical Sensitivity any earlier than August 2003 because he was completely unaware until that time that these conditions were a part of what was affecting him." (Pl.'s Resp. 9.) Plaintiff testified that although he understood that he was "having physical problems that no doctor can put a finger on. I was told [ ] that I was just a lazy person that didn't want to work, and I pretty much bought into that[.]" (Pl.'s Dep. 177:5-20.) Plaintiff finally "came to the conclusion that I was disabled in 1993 after a total collapse in 2003 where I was completely unable to function. After looking over the whole scenario I could see that I had first reached an inability to do my job in 1993." (Pl.' s Aff. Para. 1 (b), July 30, 2007 [hereinafter, Pl.'s Aff. I].) Plaintiff essentially

argues that his delayed notice should be excused because he was unaware that he was "totally disabled" within the meaning of the Policy.

The Court finds Plaintiff's justification unavailing. The Policy states: "Total disability means that, because of sickness or injury, the insured: is unable to perform all the substantial and material duties of his occupation or profession; and is not actually engaged in any other occupation or profession." (Ex. 4 to Pl.'s Dep. 5.) In his deposition, Plaintiff listed numerous physical causes of

his disability, and he admitted that he knew he suffered from those conditions from 1993 through 2003. *(See, e.g.,* Pl.'s Dep. 177:22-178:2.) Plaintiff also knew that he was unable to work for approximately nine of the ten years following his "implosion" in 1993. (See id. at 53:12-56:8.) Thus, there appears to be no good reason why Plaintiff could not have reported that his illness was causing his inability to work prior to 2003. [12]

Construing the facts in favor of Plaintiff, it appears that Plaintiff simply misjudged the nature and extent of his condition. Courts have routinely found that similar justifications do not justify a delay in providing notice of claim or proof of loss. *See, e.g., Barco v. Penn Mut. Life Ins. Co. of Philadelphia,* 126 F.2d 56, 57 (5th Cir. 1942) applying Florida law and holding that delayed notice was not excused by insured's sincere religious belief that his disability was not permanent); *Lane v. Provident Life & Accident Ins. Co.,* 178 F. Supp. 2d 1281, 1287 (S.D. Fla. 2001) (applying Florida

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[12]It also took Plaintiff nearly six months after he decided to file a claim to file the proper paperwork substantiating his claim and considered to be his proof of loss. (Pl.'s Dep.

78:14-79:6.) Plaintiff contends that this delay was justified because

> [i]t took me that long to get myself together enough where I could actually get something down. I had to have some inclination of what on earth was going on here, because it was - not only was I multiply chemical sensitive, but I also was like sensitive to electro magnetic. It was just blasting.

(Pl.'s Dep. 79:1-6.)

law and finding that delayed notice was not excused by insured's belief that disabling condition was transitory); *Ranson,* 121 So.2d at 178, 182 (delayed notice was not excused when plaintiff did not consider accident serious enough to report to insurer); *see also Equitable Life Assurance Soc'y of U.S. v. Studenic,* 77 F.3d 412, 416 (11th Cir. 1996) (applying Georgia law and finding that delayed notice was not excused by the fact that the plaintiff did not think about filing a disability claim, believed his condition would improve, and believed that being "disabled" meant being paraplegic). Although the Court sympathizes with Plaintiff's plight, under the facts and circumstances of this case, no jury could conclude that it was reasonable for Plaintiff to suffer from this reportedly debilitating condition and remain almost constantly unemployed for ten years before contacting his disability income carrier. Thus, the Court finds that, as a matter of law, Plaintiff did not comply with the Policy's notice requirements within a reasonable time.[13]

c. Presumption of Prejudice

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[13]The Court also notes that it would have been difficult for Plaintiff to comply with the terms of the Policy or understand that the Policy definition of "totally disabled" since his testimony indicates that he failed to look at the Policy until 2003. (Pl.'s Dep. 109:17-20.) Plaintiff's failure to read the contract does not excuse him from complying with its provisions. *See, e.g., Sabin v. Lowe's of Fla., Inc.,* 404 So.2d 772, 773 (Fla. Dist. Ct. App. 1981) ("'No party to a written contract in this state can defend against its enforcement on the sole ground that he signed it without reading it.'" (*quoting Allied Van Lines v. Bratton,* 351 So.2d 344, 348 (Fla. 1977).)

The fact that Plaintiff failed to timely file his notice of claim and proof of loss does not necessarily end the Court's inquiry. Rather, under Florida law, failure to comply with these provisions merely creates a presumption that the insurer was prejudiced. *See, e.g., Tiedtke v. Fid. & Cas. Co. of N.Y.,* 222 So.2d 206, 209 (Fla. 1969). The insured can rebut this presumption with evidence that the insurer was not prejudiced by the delay. *See id.*

In this case, Plaintiff has failed to produce any evidence that would rebut this presumption of prejudice. It is clear that Guardian was unable to obtain medical records from some of Plaintiff's past providers who may have been able to substantiate or refute Plaintiff's claims. More importantly however, although Plaintiff has now come forward with evidence that he may have been disabled as early as 1993, *(see* Attach. 1 to Born Aff., July 19, 2007), Guardian was deprived of the opportunity to schedule an independent, contemporaneous medical evaluation of Plaintiff's disability as expressly permitted by the Policy. *See, e.g., Laster,* 293 So.2d at 87 (finding that "[a] prompt reporting" of the disputed loss "may have enabled the insurer to better investigate and

assess its right and liabilities"); (Ex. 4 to Pl.'s Dep. 15.) Plaintiff's failure to comply with the Policy's notice and/or proof of loss provisions, coupled with Plaintiff's failure to rebut the presumption of prejudice to Guardian, compel the Court to grant summary judgment in

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favor of Guardian on Plaintiff's breach of contract claims, at least to the extent the breach of contract is based on Guardian's failure to pay benefits from February 1, 1993 until March 24, 2003.

d. Breach of Contract Claims for COLA Adjustments and Waiver Benefits

Plaintiff also alleges that Guardian breached the contract by failing to pay him all cost-of-living adjustments and by failing to refund or waive his premiums in accordance with the terms of the Policy. The Policy provides that

> [i]f the insured is disabled before age 65 for a continuous period of at least 90 days, during all of which time this policy is in force, Guardian will:
> - refund any premiums paid during that 90 days; and
> - waive any later premiums that fall due during that period of continuous disability or within three months after the insured's full recovery.

(Ex. 4 to Pl.'s Dep. 9.) In addition, the Policy contains a cost of living rider that allows the monthly benefit to be adjusted "at the end of each twelve months of a continuous claim to reflect changes in the cost of living since the start of such claim." *(Id.* at 18.)

With respect to Plaintiff's claim for additional cost-

of-living adjustments, Guardian contends that after reviewing Plaintiff's claim, "Berkshire determined that additional cost-of-living benefits of $917.04 were owed and the additional benefits were paid to plaintiff on July 18, 2007." (Faniel Aff. I Para. 23.) Plaintiff admits that he received this payment, but "would never accept as true that

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Guardian has paid all COLA benefits because they have given me no accounting of any kind whatsoever for the amounts paid." (*See* Pl.'s Aff. Para. 22, 23, Aug. 23, 2007 [hereinafter Pl.'s Aff. II].) Plaintiff has directed the court to no evidence beyond this speculative assertion that would substantiate his claim that he was entitled to cost-of-living adjustments beyond what he admits he received. Accordingly, the Court finds that no genuine issue of material fact exist as to whether Guardian breached the Policy by failing to pay Plaintiff the cost-of-living adjustments to which he was entitled under the Policy. *See, e.g., Cordoba v. Dillard's,* Inc., 419 F.3d 1169, 1181 (11th Cir. 2005) (" '[U]nsupported speculation does not meet a party's burden of producing some defense to a summary judgment motion. Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.' " (quoting *Hedberg v. Ind. Bell Tel. Co.,* 47 F.2d 928, 931-32 (7th Cir. 1995)) (second alteration in original).

With respect to Plaintiff's refund and waiver of premium claims, however, the present record contains insufficient evidence to allow the Court to resolve the matter on summary judgment. Plaintiff avers that there was never a premium waiver and that he has "constantly paid the premiums." (Pl.'s Dep. 210:17-23; Pl.'s Aff. II Para. 24.) Lance Faniel, Berkshire's Claims Manager, avers that "[w]hen

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Berkshire determined that [Plaintiff] was entitled to disability benefits, the company refunded the premiums that he had paid since his date of disability in 2003. [Plaintiff's] premiums have been waived since then, and no additional premiums have been received by Berkshire." (Faniel Aff. I Para. 24.)

Neither party has produced evidence beyond these affidavits to corroborate or refute these alleged payments, and the Court is precluded from weighing the credibility of the affiants on the parties' motions for summary judgment. *See, e.g., Warrior Tombigbee Transp. Co., Inc. v. M/V Nan Fung,* 695 F.2d 1294, 1299 (11th Cir. 1983) ("It is well established that '[t]he district court's function, in a summary judgment proceeding, is not to resolve factual issues but to determine whether there is a genuine issue of material fact. In making its determination, the court may not weigh conflicting affidavits to resolve disputed fact issues.' ") (*quoting Farbwerke Hoeschst A.G. v. MV Don Nicky,* 589 F.2d 795, 798 (5th Cir. 1979).
Summary judgment is therefore inappropriate, but only as to this narrow claim. The Court will, however, give Defendant thirty days to supplement its motion with evidence establishing that it has refunded and/or waived Plaintiff's premiums since the date it established Plaintiff was disabled. Plaintiff will have twenty days to respond with evidence that those premiums have not been refunded and/or waived. The Court also emphasizes that its decision that

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Plaintiff is not entitled to benefits from February 1, 1993 until March 24, 2003 precludes Plaintiff from recovering any waiver of premium benefit for that time period.

D. Plaintiff's Extracontractual Damages Claims

Finally, Plaintiff's Complaint alleges that he is entitled to "a 25% Penalty on all amounts due the Plaintiff per State Law, plus costs, plus a reasonable attorney's fee." (Compl. Para. 43.) Plaintiff's entitlement to these damages is governed by Georgia law. *See, e.g., John Hancock Mut. Life Ins. Co. v. Yates,* 299 U.S. 178, 181 (1936) (observing that in Georgia, "as elsewhere, the validity, form, and effect of contracts are to be determined generally by the law of the place where made, but the character and extent of the remedies and the mode of procedure by the law of the forum"); *accord Fed. Ins. Co. v. Nat'l Distr. Co., Inc.,* 203 Ga. App. 763, 765, 417 S.E.2d 671, 673 (1992) ("Under the rule of lex fori, procedural or remedial questions are governed by the law of the forum, the state in which the action is brought") .

Plaintiff presumably bases his claim on O.C.G.A. § 33-4-6, which provides that penalties and attorney fees may be assessed against an insurer who fails to pay a claim in bad faith. Under Georgia law, however, "[p]enalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and there is a disputed question of fact." *Fed. Ins. Co.,* 203 Ga. App.

at 768, 417 S.E.2d at 676 (internal quotation marks and citation omitted). In this case, Plaintiff's failure to timely produce notice of claim and proof of loss provides Guardian with a "reasonable ground to contest the claim." *Id.* Bad faith penalties and attorney fees are therefore not appropriate in this case, and Guardian is entitled to summary judgment on that claim.

CONCLUSION

For the reasons stated herein, the Court denies Plaintiff's Motion to Strike Defendant's Response and Enter

Judgment in His Favor (Doc. 50) and Plaintiff's Motion for Summary Judgment (Doc. 31). The Court grants Defendant's Motion for Summary Judgment (Doc. 27) in part and denies it in part. Further, the Court permits Defendant to supplement its Motion for Summary Judgment within thirty days with evidence establishing that it has refunded and/or waived Plaintiff's premiums in accordance with the Policy. Plaintiff will have twenty days to respond to any such filing with evidence establishing that he has paid the disputed premiums and that the premiums have not been refunded.

IT IS SO ORDERED, this 5th day of May, 2008.

s/ Clay D. Land

CLAY D. LAND
UNITED STATES DISTRICT JUDGE